TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~629.~~ 291

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ABRAM MYERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 2, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Circuit Court of the United States for the District of Kansas.

ABRAM MYERS
vs.
THE UNION PACIFIC RAILWAY COMPANY.

Be it remembered that on this day, to wit, June 7th, 1881, the defendant herein filed in the clerk's office of said court, in said entitled action, a transcript from the district court of Wyandotte county, Kansas, which said transcript is in the words and figures following, to wit:

Petition.

STATE OF KANSAS, } *ss:*
Wyandotte County, }

In the 10th District Court of Wyandotte County, Kansas.

ABRAM MYERS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The said plaintiff, Abram Myers, complains of the said defendant, The Union Pacific Railway Company, and alleges that heretofore, to wit, on the 28th day of June, 1880, said defendant was
2 carrying on the business of a railway company in the State of Kansas, and engaged in the transportation of freight and the carriage of passengers as such railway company in said State, and was then and there a common carrier as such railway company in said State, doing business in and operating its road-bed, tracks, cars, engines, and machinery under the laws of the State of Kansas. That at said date, to wit, the 28th day of June, 1880, this plaintiff was, and for a long time prior thereto had been, in the employ of said def't as a switchman; that he was then and there, and always had been, a careful, prudent, and competent servant of said defendant at all times, while in the employ of said defendant, up to and including the said 28th day of June, 1880. That it became and was the duty of said defendant to procure and keep at all times, in the management and operation of its road, safe and reliable machinery and appliances of every nature needed and required in the operation of its said road. That it became and was the duty of this plaintiff, as switchman in the yards of said defendant, at Armstrong, in the county of Wyandotte, in said State, to couple the cars and engines of said defendant, and generally to make up the passenger trains of said defendant. That on the said 28th day of June,
3 1880, in pursuance of his said duty, he was attempting to couple an engine to a certain passenger car on defendant's railway by inserting the draw-bar of the engine or coupling iron into the draw-bar or place on the passenger car where the coupling is made, but by reason of the defective construction and then condition of the bunting timber and draw-head on said engine, when the car and the engine attempted to be coupled, came together, the

draw-head of the locomotive or engine passed clear under the platform of the passenger car, producing a violent collision, and thereby catching this plaintiff between said engine and passenger car by his right leg, and thereby wounding and crushing the same. That the said wounding, crushing, & injury was caused solely by reason of the then condition & defective construction of the said engine; that its unfitness for such work and service was at the time well known to said defendant, and had been for a long time prior to the date of said injury, and said def't carelessly and negligently permitted said engine to remain in said defective condition long after said defendant had full knowledge of its then condition, and carelessly and negligently permitted said engine to be used long after it had notice and knowledge that it was dangerous to the life of employed and others, and all this prior to the said 28th day of June, 1880, and the condition of said engine was wholly unknown
4 to this pl'ff. That the said injuries *was* caused wholly by the negligence and carelessness of said defendant, and through no fault or negligence of this pl'ff. That by reason of the facts stated this pl'ff became soon sick and lame, and suffered great pain and agony for the space of four months, and during said period was compelled and employed physicians, surgeons, and nurses, at great cost and expense, to wit, the cost and expense of one thousand dollars.

Whereupon the said plaintiff prays damages against said defendant for the sum of fifteen thousand dollars, for which said amount, together with his costs, he asks judgment.

By J. B. SCROGGS AND
THOMAS P. FENLON,
His Att'ys.

To the clerk:

Please issue summons in above cause. Amount claimed, $15,000 and costs.

SCROGGS AND FENLON, *For Pl'ff.*

In the 10th District Court of Wyandotte County, Kansas.

ABRAM MYERS, Plaintiff,
vs.
UNION PACIFIC RAILWAY COMPANY, KANSAS DIVISION, Defendant.

5 In the District Court of said County.

STATE OF KANSAS, }
Wyandotte County, } *ss:*

I do solemnly swear that the cause of action set forth in the petition hereto prefixed is just; and I do further swear that by reason of my poverty I am unable to give security for costs.

ABRAM MYERS.

Subscribed and sworn to before me, this 16th day of February, A. D. 1881.

[SEAL.]

A. N. MOYER,
Notary Public.

Endorsed: No. 2732. Abram Meyers *vs.* U. P. R'y Co., Kansas Division. Filed Feb'y 28th, 1881. G. W. Betts, clerk. Scroggs & Fenlon, for pl'ff. Petition, affidavit, & precipe.

Summons.

THE UNITED STATES OF AMERICA:

THE STATE OF KANSAS, } ss:
Tenth Judicial District, Wyandotte County, }

The State of Kansas to the sheriff of Wyandotte county, in said State, Greeting:

You are hereby commanded to notify The Union Pacific Railway Company, defendant, that it has been sued by Abram Myers, plaintiff, in the district court of the State of Kansas, sitting within and for the county of Wyandotte, and that unless it answer by the 21st day of February, 1881, the petition of said plaintiff against it filed in the clerk's office of the court aforesaid, the same will be
6 taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 26th day of Feb'y, 1881.

Witness my hand and the seal of said court, affixed at my office in the city of Wyandotte, this 21st day of Feb'y, 1881.

[SEAL.] G. W. BETTS, *Clerk.*

STATE OF KANSAS, } ss:
County of Wyandotte, }

Received this summons on the 21st day of Feb'y, 1881, at 4 o'clock p. m., and served the same in my county as follows, to wit: Not being able to find John McKenzie, the person designated and appointed by the within-named company upon whom process should be made, I left a certified copy thereof, with all the endorsements thereon, at the usual place of residence of said John McKenzie, and I also delivered a copy thereof to E. T. Hovey, ag't to sell tickets & station-keeper of said company, at the depot of said company at Armstrong, Wyandotte county, Kansas, on the 25th day of February, A. D. 1881.

T. B. BOWLING, *Sheriff.*
By O. K. SEROISS, *Deputy.*

Fees—

Service	75
2 copies	50
Mileage	40
Total	$1 65

Endorsed: No. 2732. District court, Wyandotte county.
7 Summons. Issued Feb'y 21, 1881. Returnable Feb'y 26th, 1881. Abram Myers *vs.* U. P. R. R. Co. J. B. Scroggs, plaintiff's attorney. Filed Feb. 26th, 1881. G. W. Betts, clerk. Suit brought for the recovery of money. Amount claimed, $5,000.00. G. W. Betts, clerk.

Appearance.

In the District Court of Wyandotte County, Kansas.

ABRAM MYERS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Def't.

The said defendant, The Union Pacific Railway Company, comes, and, by its attorneys, hereby enters its appearance in the above-entitled cause.

J. P. USHER,
CHAS. MONROE,
Att'ys for Defendant.

Stipulation.

It is hereby stipulated that the said defendant in the above cause has until the first day of the next term of said court to plead to the above action.

MARCH 15, '81. FENLON & SCROGGS,
Pl'ff's Att'ys.

Endorsed: 2732. Abram Myers *vs.* U. P. R. R. Co. Stipulation. Filed March 15th, 1881. Geo. Betts, clerk.

8 *Answer.*

STATE OF KANSAS, } *ss:*
Wyandotte County, }

In the 10th District Court of Wyandotte County *County,* Kansas.

ABRAM MYERS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The above-named def't, by its attorney, comes, and answers the petition of the plaintiff herein, and admits that it is a railroad corporation, that it was engaged in the business of common carrier at the time and locality, and in manner and form as the plaintiff has alleged.

2nd. Defendant also admits that the plaintiff was in its employ at the time and place and in manner as by pl'ff alleged, and that in the course of his employment he received an injury, but defendant denies that said injury was received because of any fault or neglect of the defendant, and avers that the injuries complained of by plaintiff were wholly occasioned by the neglect, unskillfulness, and want of care of and by the plaintiff at the time and place where and when the said injuries were received.

3rd. Except as hereinbefore admitted, defendant denies each and every allegation in petition of pl'ff.

9 4th. The defendant further says that plaintiff, having received an injury while in the discharge of his duties as a switchman, on the said 28th day of June, 1880, the defendant after-

wards came to an accommodation and settlement with the plaintiff for and on account of the same, and the plaintiff then, July 15th, 1880, in conformity with said agreement, executed to the defendant a release from all liability for such injury, which release is as follows:

RELEASE.—Know all men by these presents, that I, Abram Myers, of Armstrong, Kansas, in consideration of the sum of thirty-one dollars ($31.00), to me paid by the "Union Pacific Railway Company," the receipt of which is hereby acknowledged, do hereby release and forever discharge the said railway company and said receiver, their successors and assigns, from all liability to me for or on account of injuries received by me on the 28th day of June, at Armstrong, while employed by "Union Pacific" R. R. Company as switchman.

Witness my hand and seal, at Armstrong, Kansas, this 15th day of July, 1880.

ABRAM MYERS. [SEAL.]

Witness present:
D. P. BIGGER.
ANDREW MYERS.

The defendant pleads said release in bar of this suit.

10 5th. Defendant further answers and says that it is a railroad and not a banking corporation, and that it was organized under a law of the United States, and that it has a defense to this action arising under and by virtue of the laws of the United States.

THE UNION PACIFIC RAILWAY COMPANY,
By J. P. USHER, *Def't's Attorney.*

Endorsed: No. 2732. Abram Myers *vs.* The Union Pacific R'way Company. Answer. Filed April 4th, 1881. G. W. Betts, clerk dist. ct. Wyandotte Co.

Petition for Removal.

STATE OF KANSAS, } *ss:*
Wyandotte County, }

In the 10th District Court of Wyandotte County, Kansas.

ABRAM MYERS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Petition for removal to the circuit court of the United States for the district of Kansas.

To said district court:

Your petitioner respectfully shows to this honorable court that it is a corporation other than a banking corporation, and organ-

11 ized under a law of the United States, namely, an act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific

Ocean and to secure to the Government the use of the same for postal, military, & other purposes." Approved July 1st, 1862, and that in accordance with said act, and the acts amendatory and supplemental thereto.

Your petitioner has exercised and does exercise its corporate functions and powers. That February 1st, 1880, pursuant to Sec. 16 of the said act of July 1, 1862, and of the act of July 2d, 1864, The Kansas Pacific Railway Company, a corporation created by the Territorial Legislature of Kansas, and organized under the laws of said Territory, and the Denver Pacific Railway & Telegraph Company, a corporation created and organized under the laws of the Territory of Colorado, both of which said companies are mentioned in said acts of Congress and their said railroads by said acts made a part of the Union Pacific Railroad system, were, by agreement, consolidated with The Union Pacific Railroad Company. Your petitioner and said consolidated company, by agreement, as by said acts authorized, assumed and adopted the name of The Union
12 Pacific Railway Company, which company, consolidated, assumed, took, and from thenceforth had and has, by virtue of said agreement of consolidation, possession and ownership of all the railroads and other property, real and personal, of said constituent companies, and has and does operate and manage the same under and by authority of said acts of Congress, and is governed and controlled by said acts, and is to all intents and purposes and in fact a corporation under the laws of the United States.

That the plaintiff, Abram Myers, has sued your petitioner, The Union Pacific Railway Company, process in this suit having been served on its agents, and your petitioner has appeared thereto and filed its answer; that the matter and amount in this suit above entitled exceeds, exclusive of costs, the sum or value of five hundred dollars; that your petitioner has a defence to said action arising under and by virtue of the aforesaid laws of the United States; that said suit has not been tried, nor has it been ready for or stood for trial, and the present is the first term of the court at which it could have been tried.

And your petitioner, desiring to remove this cause for trial into the circuit court of the United States for the district of Kansas,
13 and offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the records in this suit, including proofs, pleadings, and also all depositions, testimony, and other proceedings in the cause, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the district of Kansas, and it will ever pray.

THE UNION PACIFIC RAILWAY,
Petitione-'s Company.
By J. P. USHER, *Def't's Att'y.*

STATE OF KANSAS, } ss:
Douglass County, }

I, J. P. Usher, being duly sworn, do say that I am one of the attorneys of the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

J. P. USHER.

14 Subscribed and sworn to before me, this 2d day of April, 1881.

[SEAL.] S. C. USHER, *Notary Public.*

My commission expires May 8, 1882.

Endorsed: No. 2732. Abram Myers *vs.* The Union Pacific R'way Company. Petition for removal to U. S. cir. c't. Filed April 4th, 1881. G. W. Betts, clerk dist. c't, Wyandotte Co.

Bond.

Know all men by these presents, that we, John P. Usher, of Douglass county, Kansas, are held and firmly bound unto Abram Myers in the penal sum of one thousand dollars, lawful money of the United States, for the payment of which sum, well and truly to be made unto the said Abram Myers, his heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, and administrators, jointly and sever-ly, firmly by these presents.

Yet, upon these conditions, The Union Pacific Railway Company having petitioned the district court of Wyandotte county, State of Kansas, for the removal of a certain cause therein pending, wherein Abram Myers is plaintiff and The Union Pacific Railway Company is defendant, to the circuit court of the United States in and
15 for the district of Kansas.

Now, if the said Union Pacific Railway Company, your petitioner, shall enter into the said circuit court of the United States on the first day of its next session a copy of the record in said suit, also of all depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and effect.

Witness our hands and seals, this second day of April, A. D. 1881.

J. P. USHER. [SEAL.]

STATE OF KANSAS, } ss:
County of Douglass, }

I, John P. Usher, of said county, one of the sureties named in the foregoing bond, do depose and say that I am a resident of the State of Kansas, and a property-holder therein, and that I am worth the sum of one thousand dollars over and above all my debts and lia-

bilities, exclusive of property by law exempt from execution; that I have property in the State of Kansas liable to execution of the value of more than one thousand dollars.

J. P. USHER.

16 Subscribed in my presence, and sworn to before me, this 2nd day of April, A. D. 1881.

[SEAL.] S. C. USHER, *Notary Public.*

My commission expires May 8, 1882.

The within bond and the sufficiency of the sureties are approved, April 6th, 1881.

H. STEVENS,
Judge 10th Judicial District.

"This bond is endorsed as follows:" No. 2732. Abram Myers, plaintiff, *vs.* The Union Pacific Railway Company, defendant. Bond for removal to Federal court. Filed April 4th, 1881. G. W. Betts, clerk.

Order of Removal.

THE STATE OF KANSAS, } *ss:*
Tenth Judicial District, Wyandotte County, }

At a session of the district court, sitting within and for said county of Wyandotte, begun and held at the court-house, in the city of Wyandotte, in said county, on the 4th day of April, 1881, as by statute required, there being present Hon. Hiram Stevens, judge of said judicial district, and Th's B. Bowling, sheriff, and G. W. Betts, clerk of the district court of said county, the following proceedings were had:

WEDNESDAY, *April 6th,* 1881.

ABRAM MYERS
vs. } No. 2732.
17 THE UNION PACIFIC RAILWAY, KANSAS DIVISION.

Now on this day comes the said defendants, and presents to the court its petition and bond for the removal of this cause to the circuit court of the United States for the district of Kansas, as by law provided, and also presents to the court such bond for approval, and the court being satisfied with the sufficiency of said bond and that the same was in due form, the said bond is by the court approved.

It is thereupon considered by the court that said cause be proceeded with no further in this court, but the same be removed to the circuit court of the United States for the district of Kansas for trial.

Certificate.

STATE OF KANSAS, } *ss:*
County of Wyandotte, }

I, G. W. Betts, clerk of the district court in and for said county,

do hereby certify that the within and foregoing is a full, true, and correct copy of all the files and record of removal of this cause & proceedings had in said court in the case therein entitled, as the same appears of the files & record in my office.

In witness whereof, I have hereunto set my hand and
18 affixed the seal of said court, at my office in the city of Wyandott-, this 30th day of May, A. D. 1881.

[SEAL.] G. W. BETTS, *Clerk.*

Endorsed: No. 3454. District court Wyandott- county, Kansas. Abram Myers *vs.* The Union Pacific Railway Company. Certified copy of transcript. Law action. Filed June 7, 1881. A. S. Thomas, clerk. By W. W. Gelatt, deputy.

And on this day, to wit, Saturday, June 25th, 1881, in the June term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Motion to Remand.

ABRAM MYERS
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 3454.

Motion to remand submitted and taken under advisement. This motion was made on the 7th day of June, 1881, and should have been entered as of that date, but was omitted by mistake; thereupon it is now entered *nunc pro tunc.*

And on this day, to wit, Tuesday, December 6th, 1881, in the November term of said court, in the record of the proceed-
19 ings thereof in said entitled suit is the following entry, to wit:

Journal Entry.

ABRAM MYERS
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 3454.

On motion, it is ordered that plaintiff have leave to reply, if cause is not remanded and continued.

And on this day, to wit, Monday, April 10th, 1882, in the November term of said court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

Journal Entry.

MYERS
vs.
UNION PACIFIC RAILWAY COMPANY. } 3454.

And now, on this day, in accordance with the opinion heretofore filed herein, the motion heretofore made to remand this case to the district court of Wyandotte county, Kansas, is sustained.

It is, therefore, ordered that the same be remanded to said court

and that the clerk certify this order to the said district court of Wyandotte county.

To which ruling & decision of the court the defendant excepts.

C. G. FOSTER, *Judge.*

20 And on this day, to wit, Monday, June 12th, 1882, in the June term, 1882, of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Journal Entry.

ABRAM MYERS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } 3454.

Now, at this time, comes the plaintiff, by his attorney, Mr. T. P. Fenlon, and the defendant, by its attorneys, Mr. Usher and Mr. Williams; and the opinion of the court on the motion to remand this cause to the State court having been read and filed, on motion of Mr. Fenlon, for the plaintiff, it is ordered that this cause be remanded to the district court of Wyandotte county, Kansas, from whence the same was certified, and the former order remanding this case is revoked, the same having been entered by misadventure; and the defendant, by its attorneys, except to the decision of the court remanding the cause, and gives notice of its intention to prosecute its writ of error to the Supreme Court of the United States to reverse the same, pursuant to the statute in such case made and provided, and prays the court to affix the penalty of bond to be given by defendant for the due prosecution of said writ of error to op-
21 erate and be a supersedeas of all proceedings in the cause until the decision of the Supreme Court.

And thereupon the court determined that the bond should be in the penalty of ten thousand dollars, to be approved by a judge of the court, without determining that the same should operate as a supersedeas.

And on this day, to wit, June 13th, 1882, the defendant herein filed in the clerk's office of said court, in said entitled suit, a bond, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABRAM MYERS, Defendant in Error.

Know all men by these presents, that we, A. Caldwell and J. M. Ferguson, are held and firmly bound unto Abram Myers, of Wyandotte county, Kansas, in the sum of ten thousand dollars, to be paid to the said Abran Myers, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our
22 heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 12th day of June, A. D. 1882.

Whereas the above-named, The Union Pacific Railway Company, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Kansas: Now, therefore, the condition of this obligation is such, that if the above named, The Union Pacific Railway Company, shall prosecute its said writ of error to effect, and answer all costs and damages, including just damages for delay if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

A. CALDWELL. [SEAL.]
J. M. FERGUSON. [SEAL.]

Bond approved June 12th, 1882.
C. G. FOSTER, *District Judge.*

Endorsed: No. 3454. Bond. Filed June 13, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, deputy.

23 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

I, A. S. Thomas, clerk of the circuit court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings in the action of Abram Myers *vs.* The Union Pacific Railway Company, No. 3454, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 13th day of September, A. D. 1882.

[SEAL.] A. S. THOMAS, *Clerk.*

24 UNITED STATES OF AMERICA, *ss:*

To Abram Myer, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holdened at Washington, on the second Monday of October, on the ninth day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and eighty-two (1882.)

C. G. FOSTER, *Dis'ct Judge.*

Service of the above citation acknowledged, this 12th day of June, 1882.

THOMAS P. FENLON,
Att'y for Abram Myers.

Endorsed: No. 3454. Citation. Filed June 12, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, deputy.

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Abram Myers, plaintiff, and The Union Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 12th day of June, A. D. 1882.

[SEAL.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Endorsed: No. 3454. Abram Myers *vs.* The Union Pacific Railway Company. Writ of error. Filed June 12, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, deputy.

Writ of error allowed this 12th day of June, 1882. C. G. Foster, dis'ct judge.

26 In the Circuit Court of the United States, District of Kansas.
February, 1882.

ABRAM MYERS
vs.
THE UNION PACIFIC RAILWAY COMPANY.

On Motion to Remand.

MCCRARY, circuit judge.

Upon consideration of this motion, I have reached the following conclusions:

1. It is not necessary to decide the question so much discussed by counsel as to the validity of the agreement of consolidation. I assume that it is valid, and upon that assumption hold—

2. That the present suit is not one "arising under the Constitution and laws of the United States," within the meaning of the second section of the act of Congress of March 3, 1875, providing for the removal of causes from State to Federal courts.

3. That a suit by or against The Union Pacific Railway Company, a corporation formed in the manner disclosed in the record, is not necessarily a suit arising under the laws of the United States, so as to be removed on that ground from a State to a Federal court.

4. Even assuming that the defendant is a corporation organized under the laws of the United States, I am still of the opinion that the motion to remand should prevail, because I hold that a suit cannot be removed from a State to a Federal court upon the sole ground that it is a suit by or against such a corporation.

The causes of removal prescribed by statute are of two
27 kinds, namely, those respecting the character of the parties, and those respecting the subject-matter of the suit.

Of the former kind are suits in which there is a controversy between citizens of different States, or in which the United States or an alien shall be a party. Of the latter kind are suits arising under the Constitution or laws of the United States. A corporation may remove a cause upon the ground of citizenship, and upon the presumption that the incorporators are citizens of the State under whose laws it was organized.

A corporation may also remove a suit upon the *the* ground that it arises under the Constitution or laws of the United States.

In the present case the removal was sought upon the latter ground, and it appears from the record that it is based upon the single alleged fact that the defendant is a corporation organized under the laws of the United States, from which fact the inference is sought to be drawn that the case of the plaintiff being a suit to recover damages for personal injuries caused by the defendant's negligence, is a case arising under the laws of the United States. To this proposition I do not agree.

The inference does not necessarily follow from the fact. The removal is sought on account of the character of the subject-matter of the suit—not because of the character of the parties.

It is necessary that the record should show affirmatively that the cause of action or defense arises upon the construction of, or upon a claim of right arising under, some law of the United States, or of a treaty, or of some provision of the Constitution of the United States.

A suit against the defendant corporation is not necessarily a
28 case which arises under a law of the United States within the meaning of the removal acts. The question is not the same as that decided in Osborne *vs.* United States Bank, 9 Wheat., 738.

The question there decided was whether Congress had power under the Constitution to give the circuit courts jurisdiction in suits against the United States bank, irrespective of the subject-matter of such suits.

The affirmative of this question was established.

But there is no law of Congress authorizing the present defendant to remove a case brought against it into the United States circuit court on any other terms than those provided for all other persons and corporations.

It is not provided that all suits in the State courts by or against the defendant may be removed. If it was so provided, then a question analogous to the one decided in Osborne *vs.* The Bank, namely, the constitutionality of such an act, might arise, and upon the authority of that case it would no doubt be held that Congress had power under the Constitution to treat all such cases as within the judicial power of the United States.

The question here, however, is not what Congress might do, but what it has done; and I hold that it has not provided for the removal of every case brought by or against a Federal corporation upon the sole ground that it is a corporation organized under the laws of the United States.

I am authorized to say that Mr. Justice Miller concurs in these conclusions. It follows that the motion to remand must [be] sustained. As the questions arising upon this motion are important, affecting as they do a class of cases in this and other districts, it is desirable of course that a determination of them by the Supreme court be had without unnecessary delay, and as they relate
29 to the jurisdiction of the court, it is possible, under the recent rule of [the] Supreme Court, to have them decided by that tribunal at an early day.

Thomas P. Fenlon, for plaintiff. J. P. Usher and A. L. Williams, for defendants.

Endorsed: No. 3454. Myers *vs.* Union Pacific Railway Company & others. Conclusions & order. Filed Feb. 17, 1882. A. S. Thomas, clerk. McCrary, circuit judge.

30 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of conclusions & order in the action of Abram Myers *vs.* The Union Pacific Railway Company. No. 3454, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 18th day of February, A. D. 1882.

[SEAL.] A. S. THOMAS, *Clerk.*

Endorsed: No. 3454. Abram Myers *vs.* Union Pacific Railway Company & others. Copy of conclusions & order.

Endorsed on cover: Kansas C. C. U. S. No. 629. The Union Pacific Railway Company, plaintiff in error, *vs.* Abram Myers. Filed 2nd October, 1882.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.—No. 941.

THE UNION PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

against

ABRAM MYERS,

Defendant in Error.

FEDERAL JURISDICTION OVER THE PACIFIC RAILWAYS.

ARGUMENT.

JOHN F. DILLON,

For the Plaintiff in Error.

C. G. BURGOYNE, "Quick" Print, 146, 148 & 150 CENTRE ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1884.

THE UNION PACIFIC RAILWAY CO., Plaintiff in Error, AGAINST ABRAM MYERS.	No. 291.

Statement of Facts.

THIS ACTION was originally brought by defendant in error, February 16th, 1881, in one of the District Courts of the State of Kansas.

FOR CAUSE OF ACTION, the plaintiff below alleges, in substance, that the defendant, the Union Pacific Railway Company, was, on the 28th day of June, 1880, carrying on the business of a railway company in the State of Kansas; that at said date the plaintiff was in the employ of defendant as a switchman, and in performance of his duties as such, was attempting to couple an engine to a passenger car, and that by reason of the defective construction and condition of the engine, the plaintiff was caught between it and the car, and his leg crushed. The plaintiff alleged knowledge on the part of the company of the defective condition of the

engine, and claimed damages on account of his injury in the sum of fifteen thousand dollars.

Record, pp. 1, 2.

AN ANSWER was filed, containing a denial of the allegations of the complaint as to the negligence of the defendant, and also pleading, in bar of said suit, a certain release executed by said Myers, which release is set out in full in the answer. The answer also contains the following allegation :

"FIFTH. Defendant further answers and says that it is a railroad and not a banking corporation, and that it was organized under a law of the United States, and that it has *a defense to the action arising under and by virtue of the laws of the United States.*"

Record, pp. 4, 5.

At the same time, the defendant filed a petition for the removal of the cause into the Federal Court, which petition was accompanied with a proper bond.

Record, pp. 5–8.

THE PETITION FOR REMOVAL set out the following jurisdictional facts :

"That the petitioner is a corporation other than a banking corporation, and organized under a law of the United States, namely, an act of Congress entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1st, 1862, and the acts amendatory thereof and supplemental thereto."

The petition for removal then alleges the consolidation, under section 16 of the Act of Congress of July 1, 1862, and of July 2, 1864, of the Union Pacific Railroad Company, the Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company,

under the name of the defendant, viz., "The Union Pacific Railway Company," and then avers that, from the date of such consolidation, the defendant "has operated and managed the said railroad under and by authority of said Acts of Congress, and is governed and controlled by said acts, and is to all intents and purposes and in fact a corporation under the laws of the United States."

"That petitioner has a defense to said action arising under and by virtue of the aforesaid laws of the United States, and that the matter and amount in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars."

Record, pp. 5–8.

THE STATE COURT ORDERED THE CAUSE to be removed to the Circuit Court of the United States for trial, and a transcript was duly filed therein.

Record, p. 9.

THE PLAINTIFF MOVED TO REMAND the cause. The Circuit Court sustained the motion, and the defendant excepted.

Record, pp. 9–10.

THE OPINION of the Circuit Court remanding the cause is in the record.

Record, pp. 12–14.

ASSIGNMENT OF ERRORS.

The Court erred in remanding the suit to the State Court.

Certain Statute Provisions.

The Congress of the United States has chartered four great trans-continental railway lines, viz.:

The Union Pacific Railroad Company,

The Northern Pacific Railroad Company,

The Atlantic & Pacific Railroad Company,

The Texas & Pacific Railroad Company.

In the charter of the "*Union Pacific Railroad Company*" Congress created a corporation under that name and in section 1 (12 Stat. at Large, 489) enacted July 1, 1862, that

"It shall be able to sue and be sued, plead and be impleaded, defend and be defended in *all courts of law and equity within the United States.*"

In the case of the "*Northern Pacific Railroad Company,*" Congress created a corporation by that name, and enacted July 2, 1864, that

"It shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States" (13 Stat. at Large, pp. 365, 366, Sec. 1).

In the case of the "*Atlantic & Pacific Railroad Company*" Congress created a company by that name, and enacted July 27, 1866, that

"It shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States" (14 Stat. at Large, 202).

In the case of the "*Texas & Pacific Railroad Company*" (name afterwards changed to Texas & Pacific Railway Company) Congress enacted March 3d, 1871 (16 Stat. at Large, 573) that certain named persons, their associates and successors, are

"Hereby created a body politic and corporate in fact and in law, by the name, style and title of the Texas & Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States."

ARGUMENT IN THE MYERS CASE.

THREE CAUSES, including this one, on the docket of this term, have been advanced, presenting in different phases the question of FEDERAL JUDICIAL JURISDICTION OVER THE CORPORATIONS KNOWN AS THE PACIFIC RAILWAYS.

In one, No. 810, the *Union Pacific Railway Company vs. Knuth*, a passenger sued the Consolidated Company in a State Court, in Nebraska, for a personal injury caused by the company's alleged negligence "in failing to furnish suitable, proper and safe means whereby the plaintiff could safely leave the depot room and depot grounds at the Town of North Bend, Nebraska," on the main line of the old Union Pacific proper. The company removed the cause to the Federal Court, which, on the plaintiff's motion, remanded it. Whether it was properly remanded is the question in that case. It is just like the present case, unless the fact that, in that case, the injury arose on that part of the Consolidated Company's line which was originally chartered by the Act of Congress of July 1, 1862, while, in this case, the injury arose on what was originally the Kansas Pacific line, makes an essential difference.

In the other case, No. 461, *The Union Pacific Railway Company vs. City of Kansas*, the cause of action arose in *Missouri*, on a part of the company's line which was authorized to be built—not by the State of Kansas—but by the Act of Congress of July 1, 1862, and July 2, 1864, and involves, among other questions, the right of the municipal authorities of Kansas City in *Missouri* to expropriate, *in invitum*, part of the lands

acquired, held and used by the company under the Act of Congress of July 1, 1862, and July 2, 1864, with the license of the State of Missouri, as depot grounds, and the further question whether such a cause is one of federal cognizance.

THE IMPORTANCE OF THESE QUESTIONS, not only to the companies, but to the public, and to suitors who may prefer to litigate with the companies in the federal tribunals, and to the Government as the sovereign of the companies, is so apparent as not to require observation. Neither of the three causes mentioned directly presents the question as to the right of suitors to sue the companies *originally* in the Federal Courts or the corresponding right of the companies to bring *original* suits in the federal tribunals, but the *principles* which underlie the question of original federal jurisdiction will be, or may be, found to be decisive of the question of federal jurisdiction over them by way of removal.

Indeed, the learned counsel for the defendant in error in the cause now under consideration seems to deny the *original jurisdiction* of the Circuit Courts, under the Congressional Charters, as well as their jurisdiction by way of removal over the Pacific Railway Companies, in any case whatever (p. 5).

"In the charter of the Union Pacific Railroad, Congress was careful not to confer any jurisdiction on the Federal Courts in suits by or against it"—a proposition which we deny, and which, if unsound, establishes, or goes far to establish, the federal jurisdiction over the same class of suits by removal, under section 640, R. S., and especially under the Act of March 3, 1875.

With these preliminary observations we proceed to state the grounds on which we maintain that the present cause—the case of MYERS, was improperly remanded to the State Court.

The cause is removable both under Section 640, of the Revised Statutes, and under the Act of March 3, 1875.

We propose to show in support of the above proposition—

I. That the Union Pacific Railway Company is, and on the motion to remand, must be assumed to be, *a corporation organized under the laws of the United States, as stated in the petition for removal.*

(Although it is conceded by the Court below (Record, p. 2), and is now conceded by the learned counsel for the defendant in error " that the plaintiff in error (The Consolidated Company), is a corporation organized under a law of the United States " (Brief, pp. 3, 17), yet as the concession may not necessarily be accepted by this Court as conclusive, it may be well briefly to state the reasons why it is such a corporation.)

II. That by the sound and accepted construction of Section 640 of the Revised Statutes, the averment of the petition for removal, that the defendant federal corporation (other than a banking corporation) *has a defense arising under the Constitution and Laws of the United States, is sufficient, and the truth of such averment cannot be inquired into or contested on a motion to remand.*

III. But if otherwise, and if the Court is justified in going beyond the averment in the petition for removal in this respect, then that by the sound construction of

said section *any defense made by such corporation is a defense arising under and by virtue of a law of the United States; and, therefore, the cause was removable under Section 640 of the Revised Statutes.*

IV. The cause was also *removable under the Act of March 3, 1875,* because the defendant is, and is conceded to be, a federal corporation, and, therefore, every suit against it is a suit arising under the laws of the United States.

I.

The Union Pacific Railway Company is, and on the motion to remand must be assumed to be, and by the defendant in error is conceded to be, a corporation other than a banking corporation, organized under the laws of the United States, as stated in the petition for removal.

On the 1st day of July, 1862, the first Pacific Railroad Act was passed by Congress, which act chartered the Union Pacific Rail*road* Company and provided for government aid in the construction of the railroad and for like aid in respect of several other railroad corporations mentioned therein.

The 16th section of the act enacted:

"That at any time after the passage of the act all of the railroad companies named therein and assenting hereto, or any two or more of them, are authorized to form themselves into *one consolidated company;* notice

of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act."

An amendatory act was passed July 2, 1864. This act also made provision, by section 16, for the consolidation of any two or more of the corporations embraced in the Pacific Railroad system, as follows:

"That any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations, as the same may or shall be, upon such terms and conditions, and in such manner as they may agree upon and as shall not be incompatible with this act, or the laws of the State or States in which the road of companies may be."

In 1880, the Union Pacific Rail*road* Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, acting under the authority of Section 16 of the Pacific Railroad Act of July 1st, 1862, and section 16 of the Act of July 2d, 1864, entered into an agreement for the consolidation of the three companies into one, by name of the Union Pacific Rail*way* Company, the defendant herein.

See Petition for Removal, Record, p. 6.

These facts are alleged in the petition, as follows:

"That Feburary 1st, 1880, pursuant to Sec. 16 of the said Act of July 1, 1862, and of the Act of July 2d, 1864, The Kansas Pacific Railway Company, a corporation created by the Territorial Legislature of Kansas, and organized under the laws of said Territory; and the Denver Pacific Railway and Telegraph Company, a corporation created and organized under the laws of the Territory of Colorado, both of which companies are mentioned in said acts of Congress and their

railroads by said acts made a part of the Union Pacific Railroad system, were, by agreement, consolidated with The Union Pacific Railroad Company. Your petitioner, the said consolidated company, by agreement, as by said acts authorized, assumed and adopted the name of The Union Pacific Railway Company, which company, consolidated, assumed, took and from thenceforth had and has, by virtue of said agreement of consolidation, possession and ownership of all the railroads and other property, real and personal, of said constituent companies, and has and does operate and manage the same under and by authority of said acts of Congress."

The plaintiff in error maintains that Congress had the power to confer upon said companies the authority to consolidate contained in the said acts.

The plaintiff cannot, of course, dispute the validity of the consolidation, because he has sued the consolidated corporation *by name*.

By that averment the plaintiff necessarily admits that it is a corporation organized under the laws of the United States—for the Union Pacific Railway Company derives its corporate existence from the said acts of Congress, authorizing the union of the several railroad companies constituting it. It claims to have and can have no other source of existence.

II.

That, by the sound and accepted construction of Section 640, the averment of the petition for removal, that the defendant federal corporation (other than a banking corporation) has a defense arising

under the Constitution or laws of the United States is sufficient; and the truth of such averment cannot be inquired into or contested on a motion to remand.

The petition of the defendant for removal was verified, as required by Section 640, and expressly stated:

"*That your petitioner has a defense to said action arising under and by virtue of the aforesaid Laws of the United States.*"

That is, the Act of July 1st, 1862. The answer of the Railway Company also contained an allegation (Record, p. 5) to same effect, to wit:

"That it has a defense to this action arising under and by virtue of the laws of the United States."

Such an allegation in the petition for removal, and in the answer, are sufficient to establish, *prima facie*, at least, the federal jurisdiction, *although the facts constituting such defense are not stated, or the defense itself disclosed.*

The opinion delivered by the Circuit Court remanding the cause (Record, p. 12) does not discuss the question of removability, under section 640 of the Revised Statutes, but only with reference to the Act of March 3d, 1875. This may have been because the Court assumed that the same principles underlie both acts. It held that the cause was not removable under the Act of 1875, although the Union Pacific Railway Company is a corporation organized under the laws of the United States. The Court says—

"That the present suit is not one arising under the Constitution and Laws of the United States within the

meaning of the second section of the Act of Congress of March 3, 1875, providing for the removal of causes to the Federal Courts."

The cases, below cited, decided in other circuits, and the decision of Mr. Justice MILLER, in Turton vs. Union Pacific R. R. Co. (3 Dillon, 366), construing section 640, are not referred to or discussed by the learned Judge.

THE FIRST QUESTION presented on this record is, whether the petition of the defendant for the removal of the cause was sufficient to give the Circuit *jurisdiction under section 640 of the Revised Statutes?* The petition complied literally and exactly with all the requirements of that section.

An examination of the decisions shows that the Courts, in every case in which the question has arisen, have decided that a petition of a Federal corporation for a removal under section 640, stating that the defendant *has a defense to the action arising under an act of Congress—giving the title of such act—is sufficient, although the petition does not state what the defense is or what are the facts which constitute it.*

JUDICIAL CONSTRUCTION OF SECTION 640 OF THE REVISED STATUTES.

In Mayor vs. Cooper, 6 Wall., 247, it was said by the Court, that

"Two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the Court the capacity to take it, and an Act of Congress must have supplied it."

The result reached in the exhaustive and learned opinion of Mr. Justice BLATCHFORD, in *Fisk vs. Union Pacific R. R.*, 6 Blatchford, 362, was that under the decision in *Osborn vs. Bank* (9 Wheat., 740), and under the subsequent decisions, the Constitution had given the Circuit Court the capacity to take jurisdiction of any suit against a corporation organized under the Laws of the United States, on the ground that such *a suit necessarily arose under the Constitution or laws of the United States.* It rested with Congress to supply such jurisdiction and to prescribe the conditions of it. This was done by the Act of July 1, 1862, Sec. 1, and by the Act of July 27th, 1868, now Section, 640 R. S., and again by the Act of March 3, 1875.

Mr. Justice BLATCHFORD (Fisk vs. Union Pac. R. R. Co., 6 Blatchf., 378), thus construes Section 640:

"Under this provision [Section 2 of the Act of July 27th, 1868], and in analogy to the provisions of the Acts of 1833 and 1863, it is only necessary that a suit at law or in equity, shall be commenced in a Court other than a Circuit Court or a District Court of the United States, against a corporation other than a banking corporation, organized under a law of the United States, for a liability, or alleged liability, of such coporation. *That is all that is necessary, in the first place, to authorize the suit to be removed.* * * *

* * * "Of course, the main point upon which the jurisdiction by removal is made by this statute to depend, is *the averment to be made in the petition*, provided for afterward, that the corporation or the member thereof as such member, has a defense arising under and by virtue of the Constitution of the United States, or some treaty or law of the United States."

It is maintained by the Railway Company that under this construction (which is submitted to be the true one to be put upon Section 640) the only limita-

tion, irrespective of value, placed upon the jurisdiction by Congress is that an *averment should be made in the petition for the removal*, that the corporation has a defense arising under and by virtue of the Constitution of the United States, or some treaty or law of the United States. It is also maintained by the Railway company that the petition need not state the *facts constituting the defense* of the corporation, or disclose the character of the defense; and furthermore, that the truth of the averment that the corporation has such defense cannot be inquired into or controverted on a *motion to remand* to the State Court, but that a contest of this kind can be determined only on formal pleadings and proofs at the trial. And it is believed that the above views are supported by the decisions of every Federal Court that has had occasion to construe Section 640.

Thus in the case before referred to (Fisk vs. Union Pac. R. R. Co., 6 Blatchf., 362), it was held:

"Where in a petition for removal under the Act of July 27th, 1868, the defendants petitioning comply with the act by setting out that they have a defense in the suit, arising under the Constitution of the United States and the laws of the United States, *that averment must in the Courts of the United States be accepted as true until it is disposed of on the trial of the case.*"

The same view was taken of the meaning of the section in the same case when it came before Mr. Justice NELSON, 8 Blatchf., 243.

So in Jones vs. Oceanic Steam Navigation Co. (not organized under any Act of Congress), 11 Blatchford, 406, BLATCHFORD J. says:

"Assuming that the Act of 1868 (section 640) does apply to the present case, I am of opinion that the

proceedings for the removal for the cause were regular * * * The petition for removal states merely that the defendant has a defense to the action, arising under the Act of March 3d, 1851 (an Act to protect ship owners) giving its entitling, and prays for a removal of the suit into this Court under the Act of July 27th, 1868, giving its entitling. *It is objected that the petition does not set forth affirmatively facts* from which this Court can see that the defense is one arising under the Act of 1851, and also that the Act of 1851 cannot, under any circumstances, apply to a defense set up by the defendant in this suit, for the reason that that Act has no application to a foreign ship owner, and especially none to the liability of a foreign ship owner to an alien, (the plaintiff being an alien), or a contract made abroad as the contract in this case was. The petition is sufficient, without stating what the defense is. The contest as to the existence and validity of the alleged defense, involving also the scope of the operation of the Act of 1851, cannot be determined on an interlocutory motion, if the proceedings for removal have conformed to the Statute. *Such a contest can be determined only on formal pleadings and proofs in this Court.* Citing Dennistown vs. Draper, 5 Blatchf. C. C. R. 336; Mayor vs. Cooper, 6 Wallace, 247.

So, in the case of State of Texas vs. Texas & Pacific Railway Company, 3 Woods, 308, it was held by DUVAL & MORRILL, J.J., that the defendant in that case might remove causes under section 640, R. S. That was a suit by the State of Texas "to recover of defendant company, as forfeited, certain land grants and reservations made and granted to it by the State of Texas."

The petition for removal was based upon Sec. 640, Rev. Stats.

The Court adjudged these points:

1. Under Section 640, Revised Statutes, the right of a corporation of the class therein mentioned, when sued in a State Court, to remove the

cause to the Federal Court, does not depend on the citizenship of the parties.

2. *The truth of averments made by such defendant corporation, in its petition for removal, to the effect that it has a defense arising under or by virtue of the Constitution or laws of the United States, cannot be inquired into or controverted on a motion to remand the cause to the State Court.*

ON THIS GROUND WE INSIST THAT THE ORDER REMANDING THE CASE AT BAR WAS ERRONEOUS AND MUST BE REVERSED.

III. and IV.

The third proposition we propose to discuss is:

If the Court is justified in going beyond the averment in the petition for removal and inquiring into the nature of the defense, and into the fact of its federal character, then by the sound construction of said section, any defense made by such federal corporation is a defense arising under and by virtue of a law of the United States. The cause is therefore removable under Section 640 of the Revised Statutes.

The fourth proposition is this:

The cause was also removable under the Act of March 3, 1875, because the defendant is a federal corporation, and therefore every suit against it is a suit arising under the laws of the United States.

It will be convenient to discuss these propositions

together because they are based on the same grounds, or rest upon the same principles.

We may remark that the petition for removal contains allegations sufficiently broad to authorize the removal, both under section 640 and under the Act of March 3, 1875. This was Mr: Justice MILLER's opinion in the case of the City of Kansas. (*Reprinted in Brief of Railway Company in that case at pp. 3, 4*). Under the decision in RAILROAD CO. vs. MISSISSIPPI (102 U. S., 135), "a *case arises* under the laws of the United States when the *defense arises* under such laws." Therefore the allegation in the petition for removal that the Railway Company, has a *defense* arising under the laws of the United States, necessarily carries with it the proposition that the *suit arises* under the laws of the United States. So, too, the federal character of the corporation is shown by the petition for removal and the answer, and this is sufficient, in connection with the charter of the company, to bring the case under the Act of 1875.

THIS COURT HAS DECIDED that the Act of July 1, 1862, and July 2, 1864, are to be read together as constituting one Act.

Union Pacific R. R. vs. Hall, 91 U. S., 343, 350.

The 16th section of the Act of July 1, 1864, by virtue of which (in connection with 16th section of the Act of July 1, 1862) the consolidation was made, distinctly enacts that:

"ALL *the provisions of this Act*" (that is, the Act of July 1, 1862, and July 2, 1864), "so far as applicable, relating or in any manner appertaining to the com-

panies so consolidated, OR EITHER THEREOF, *shall apply and be of force as to such consolidated organization.*"

The State of Kansas consented to the Pacific Railroad legislation, by divers joint resolutions and Acts. (See *Quo warranto* cases and arguments therein, and the Act of the State of Kansas of March 5, 1862, reprinted in the brief (p. 34) of the counsel for the defendant in error in No. 461, *The Union Pacific Ry. Co. vs. City of Kansas*, at the present term).

The effect of the consolidation under the Act of Congress would seem to be that the legal *status* of the consolidated company would be the same on all parts of its line, whether in Nebraska, Wyoming, Utah, Kansas or Colorado. Each and every part is subject to the same duties, and the whole road throughout its entire extent is required, under penal sanctions,

"To be operated and used, for all purposes of communication, travel and transportation, so far as the public and Government are concerned, *as one continuous line.*"

THE PROVISION in section 1 of the Act of July 1, 1862, that the "Union Pacific Railroad Company might sue and be sued in *all courts within the United States*" (hereafter discussed) became under the provisions of section 16 of the Act of July 2, 1864, quoted *supra*, applicable to the consolidated company in its entire extent; and section 640, R. S., and the Act of March 3, 1875, sections 1 and 2, also apply to the consolidated company equally in every State and territory, where its line of road is situated, giving to it *an uniform legal status and character as a federal corporation and not making it a hybrid corporation, partly State and partly Federal*—that is, a *State* corporation in Kansas

and a *Federal* corporation in Colorado, Nebraska Wyoming and Utah. The Court may remember the arguments in the *Quo warranto* cases in which it was attempted to be shown that the Kansas Pacific was built throughout its entire extent under the authority of the Acts of Congress; and that at all events, all parts of the Kansas Pacific line *outside* of Kansas, in Missouri, Colorado and Wyoming were indisputably built under those Acts and not by virtue of any legislation of Kansas.

In *Peniston's* case (18 Wall.) this Court held, commenting on and explaining *Thompson's* case, that "*there is no difference which can be pointed out between the nature, extent or purpose of the federal agency of the Kansas Pacific and Union Pacific*,"—all being alike national.

THE RESULT OF THIS REASONING is that the right of the consolidated company to remove this case arising in Kansas on what was the line of the Kansas Pacific, is precisely the same as its right to remove a like cause arising in Nebraska on what was the line of Union Pacific. In other words, that this cause is, as respects federal jurisdiction, like the case of the *Union Pacific Railway Co. vs. Knuth* (No. 810 of this term, hereinbefore mentioned (*ante*, p. 5), remanded by the Circuit Court for Nebraska.

OSBORN'S CASE CONSIDERED.

In support of propositions III. and IV. above, we rely upon *Osborn vs. United States Bank*, 9 Wheaton,

740, and the cases referred to hereafter which follow it and apply its principles to cases like the present.

The facts in Osborn's case are familar.*

The following extracts from the judgment of the great CHIEF JUSTICE sufficiently show its application to the case at bar under Section 640 R. S., and especially under the Act of March 3, 1875, which literally follows the words of the Constitution.

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* "The Court having expressed a wish that the cause should be reargued upon the point of the constitutionality and effect of the provision in the charter of the bank which authorizes it to sue in the Circuit Courts of the Union, it was this day (March 11, 1824) argued upon that point by Mr. CLAY, Mr. WEBSTER, and Mr. SERGEANT for the jurisdiction, and by Mr. HARPER, Mr. BROWN and MR. WRIGHT against it" (p. 804).

The scope and exact legal value and effect of the opinion and judgment of the Court will be more clearly understood in the light of the propositions submitted and argued by the respective counsel.

It will be seen that all that can be said on either side in the present case was anticipated in the arguments of the eminent counsel in that case; and their arguments were not only considered by the Court, but examined in the opinions delivered.

FOR THE JURISDICTION it was *inter alia* said (the language seems to be that of Mr. WEBSTER):

"That Congress had constitutional authority to confer this jurisdiction on the Circuit Courts. 'It was a case arising under the Constitution and Laws of the United States.' Every case in which the Bank of the United States is a party, is in the strictest literal interpretation of the clause, a case arising under a law and the Constitution of the United States. *But for the law the case would never have existed. But for the continued existence of the law it could not continue to exist. If, by any conceivable means, the law were to be determined, the case would be at an end. There is, therefore, an indispensable, indissoluble connection between the law and the case as cause and effect. The case owes its being to the law and only to the law.* The establishment of a corporation is a legislative creation of a faculty, of a moral being, invisible and intangible, but with capacities, powers and privileges, rights and duties. The rights it may acquire, the wrongs it may suffer, the obligations it may incur, the injuries it may inflict, the acts it may do, its power

The charter of the bank having conferred upon it the power to sue [in any case] "in any Circuit Court of the United States," the question was, whether the act was, in this respect, within the grant of judicial power of the United States, which extends to "all cases arising under a law of the United States."

MARSHALL, C. J. (p. 823):

"We think, then, that when a question to which the judicial power of the Union is extended by the Con-

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to do or to endure are all derived from and dependent upon the charter. To the charter it owes its being, its continued existence, its qualities and properties. The charter defines its duties and affords the only measure of its responsibilities. Every act it performs derives its validity from the charter only; and whenever it deals with another it deals under and according to the charter. In the same manner, whoever deals with it, deals under and according to the charter. Its capacity to contract and to sue and be sued are all derived from that source. *It cannot come into Court without bringing the law in its hand.* It is bound in every case to show that it is acting within the limits of its corporate powers as defined in that law. *There can be no case where the bank is a party in which questions may not arise under the laws of the United States.* In every such case it must appear that it was duly created, continues to exist, has power to contract and to bring the suit. All these are matters arising under the laws of the United States, and under no other. Suppose an officer created by act of Congress, could not Congress confer on him the privilege of suing and being sued in his official capacity in the courts of the Union? Such an officer has two capacities, private and official, and may be subject to different jurisdictions, according as either is affected. But a corporation has but one capacity, and its faculties cannot be divided. Whenever an authority is given all that is done by virtue of that authority is done under it. Everything done by the bank is done under the charter.

"*If it should be contended that the character of the case depends upon the questioas to arise in it, the answer is, that it is not so restricted by the Constitution:* and that it cannot be previously known what particular questions may arise in the progress of the cause. The principal draws to it the incident or accessory. The character of the case depends upon its general nature. Every suit brought by

stitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it.

"The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it

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the bank is for the funds placed in its charge under a law of the United States.

"Osborn vs. U. S. Bank, 9 Wheaton, 806, 807.

"In that part of it which relates to cases arising under the Constitution, laws and treaties of the Union there is a redundancy in the language: 'ALL cases.' The pleonasm is here meant to perform its usual office to be emphatic. It marks the intention and affords a principle of construction. The additional terms, 'all cases in law and equity' also serve to heighten the effect and to show that nothing of this essential power was to be put to hazard. Surely such a clause must be construed liberally.

"Osborn vs. U. S. Bank, 9 Wheaton, 809."

AGAINST THE JURISDICTION it was *inter alia* said by counsel:

"It was also contended that every right that accrues to the bank in its corporate character, upon which a suit can be maintained, is to be regarded as arising under the charter, and, consequently, under a law of the United States. But the jurisdiction of the Federal Courts, if it attach at all, must attach either to the *party* or to the *case*. The party and his rights cannot be so mixed together as that the legal origin of the first shall give character to the latter. A controversy regarding a promissory note or bill of exchange cannot be said to arise under an act of Congress, because the bank, which is created by an act of Congress, has purchased the note or bill. Neither the rules of evidence, nor the law of contract can be regulated by the National Legislature. But, in the case supposed, no question can arise, except under the law of contract and the rules of evidence. No law of Congress is drawn into question, and its correct decision cannot possibly depend upon the construction of such law. The bank cannot come into the Federal Courts as a party suing for a breach of contract or a trespass upon its property; for neither its character as a party, nor the nature of the controversy can give the Court jurisdiction. *The case does not arise under its charter. It arises under the general or local law of contract, and may be determined without opening the statute book of the United States.*"

Osborn vs. U. S. Bank, 9 Wheaton, 814, 815.

possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. *Can a being, thus constituted, have a case which does not arise literally as well as substantially under the law?* Take the case of a contract, which is put as the strongest against the bank.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends upon a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions and they exist in every possible case. * * *

"The question forms an original ingredient in every cause. *Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied upon.* The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense and must depend on the state of things when the action was brought. *The questions which the case involves then must determine its character, whether those questions be made in the cause or not.*"

Speaking of an action on a contract, the Court continues:

"The Act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than

the charter of incorporation. The action still originates in, and is sustained by that charter" (p. 825).

Although "a suit brought by the bank may depend, in fact, *altogether* on questions unconnected with any law of the United States," still the Federal jurisdiction attaches (p. 826).

"The plea in bar may be payment, if the suit be brought on a bond, or *non-assumpsit* if it be brought on an open account, *and no other question may arise* than what respects the complete discharge of the demand" (p. 826).

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So a case under the patent law "arises under a law of the United States, yet the defendant may not at the trial, question the validity of the patent, or make any point which requires the construction of an Act of Congress" (p. 826).

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"It is said that a clear distinction exists between the *party* and the *cause;* that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the Courts of the United States, as give that right to the bank."

This distinction is not denied; and if the Act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. EVERY ACT OF THE BANK GROWS OUT OF THIS LAW, AND IS TESTED BY IT. TO USE THE LANGUAGE OF THE CONSTITUTION, EVERY ACT OF THE BANK ARISES OUT OF THIS LAW (p. 827).

The result of this reasoning is that not only does every suit brought by or against a federal corporation arise under the laws of the United States, but that every defense made by such corporation arises under such law. As stated in the opinion of the Court:

"It (the U. S. Bank) is not only itself the mere crea-

ture of the law, but all its actions, and all of its rights, are dependent on the same law."

This applies with equal force to the Union Pacific Railway Company. It derives all of its rights and powers from the laws of the United States. Mr. Justice BLATCHFORD in Fisk vs. Union Pacific R. R. Co., 6 Blatch., 369, quotes the above from Osborn vs. The Bank, and adds:

"The Chief Justice then proceeds to say, and I cite these observations of his because they are quite applicable to the present cause in many of its aspects."

TWO CLASSES OF ADJUDICATIONS WILL NOW BE REFERRED TO, APPLYING THE PRINCIPLES OF OSBORN'S CASE TO CASES LIKE THE ONE AT THE BAR.

1. Adjudged cases under the provision in the PACIFIC RAILROAD CHARTERS that these companies "*shall be able to sue and to be sued in* ALL COURTS OF LAW AND EQUITY WITHIN THE UNITED STATES."

This language is broad enough to include and was intended to include the Circuit Courts of the United States, and has, ever since the Pacific Railroad Acts went into effect, invariably been construed to authorize ORIGINAL suits in the Federal Courts by and against these federal corporations, without reference to the citizenship of the parties or the character of the cause if it fell within the class of actions of which those Courts had general jurisdiction.

2. Adjudged cases holding that the Pacific Railroads may *remove cases* of this character under the Act of March 3, 1875, and under Sec. 640, R. S.

1. *Original suits against Pacific Roads in the Circuit Court.* It has been decided twice by Mr. Justice MILLER, under the above language, in the charter of the company, *that the Circuit Court of the United States has jurisdiction of* ORIGINAL SUITS *against the Union Pacific, without reference to the citizenship of the adverse party.* Thus, in Smith vs. Union Pacific Railroad Company, 2 Dillon, 278, the plaintiff, a citizen of Ohio, brought an ordinary suit in tort, just like the case at the bar, against the Union Pacific in the United States Circuit Court for Nebraska, to recover damages for injuries received while in the employ of the company as brakeman. The company demurred, on the ground that the Court had no jurisdiction of the company or the subject matter of the action; and the cases of the U. S. vs. Deveaux, 5 Cranch, 61; Bank vs. Martin, 5 Peters, 479; Osborn vs. Bank, 9 Wheat., 738; Bank vs. Bank, 4 Wash. C. C. R., 168, were cited by counsel. The Court sustained the Jurisdiction, saying:

Mr. Justice MILLER: "I have examined the previous decisions of the Supreme Court of the United States supposed to have an important bearing on the question now presented; and, after reflection, am still of opinion that Congress intended to make the defendant capable of suing and being sued in the Federal Courts which have jurisdiction of the same class of actions between other parties."

So, in Bauman vs. Union Pacific R. R. Co., 3 Dillon, 367, the action was originally brought in the U. S. Circuit Court in Nebraska, by a citizen of Nebraska, against the defendant company, which moved to dismiss for want of jurisdiction in the Court.

Mr. Justice MILLER: "The question is whether the defendant is suable in this Court by a citizen of the

State of Nebraska. Under the charter of the defendant company, I have heretofore held that it was suable in this Court by a citizen of another State (Smith vs. Union Pacific Railroad Co., 2 Dillon, C. C. R., 278), and I am of opinion, *upon consideration of the provisions of the charter*, that it may sue and be sued in this district without reference to the citizenship of the adverse party."

The cases hereinafter referred to show that the same construction has been placed upon the act by the Federal Courts in Oregon, New York and elsewhere that was given to it by Mr. Justice MILLER in the two cases last cited. It has never, so far as I know, been held otherwise. When we consider the large interest, pecuniary and otherwise, which the United States has in these roads, which led it to provide for Government directors; and that these roads stand charged with duties in perpetuity towards the United States—duties of such a character that the United States, in subordinating, in 1864, its lien to that of the first mortgage creditors, took care to secure the performance thereof, notwithstanding the foreclosure of the first mortgage, can it reasonably be maintained that Congress, in enacting that the company "shall be able to sue and be sued in *all courts of law and equity within the United States*," did not mean to include the law and equity courts of the general Government?

THE LANGUAGE that this corporation "shall be able to sue and be sued in *all courts* of law and equity *within the United States*," being broad enough to include the Federal Courts, on what justifiable ground of construction can these Courts be excluded? If we consider the decisions of the Supreme Court which had then

been made (*Bank* vs. *Devaux*, 5 Cranch, 61, and *Osborn* vs. *Bank*, 9 Wheat. 738), and the subject matter and purpose of the Pacific Acts, and the special and large interest of the Government in the company, which was primarily created for its own uses, we cannot reasonably avoid the conclusion that Congress used this comprehensive language, "*all courts of law and equity within the United States*," for the very purpose of including the Federal Courts. The only answer to this having the least plausibility, is, that it was merely the purpose of Congress, in the use of this language, to give the company the capacity to sue in all courts, and not to enlarge the jurisdiction of any of the courts thus referred to, and that the case falls, on this point, within the *Bank* vs. *Devaux*.

The reply is that in the *Devaux case* the language was merely permissive to the corporation "to sue and be sued in courts of record or any other place whatsoever;" and that in that case the result was largely influenced, if not controlled, by the 9th article of the 7th section of the Bank Act, which expressly authorized the bringing of one specified class of suits in the Federal Court.

"This evinces," said the Court, "the opinion of "Congress, that the right to sue does not imply the "right to sue in the courts of the Union, unless it be "expressed."

There is no such feature in the Pacific Railroad Acts. The *Devaux case* was commented on and explained by the Chief Justice in *Osborn's case* (9 Wheat., pp. 817, 818), and his language seems to imply a doubt of its soundness; at all events, he expressly limits its scope.

Referring to the *Devaux case*, MARSHALL, C. J., says:

"Whether this decision be right or wrong, it amounts only to a declaration that a general capacity in the bank to sue, without mentioning the Courts of the Union, *may* not give the right to sue in those courts. To infer from this that words expressly conferring a right to sue in those courts do not give the right, is surely a conclusion which the premises do not warrant."

IN THE CASE AT BAR, THE COURTS OF THE UNION are embraced in the comprehensive, unqualified words, "all courts of law and equity within the United States," as effectually and almost as indisputably as if these courts had been named; and, if embraced within the purpose of Congress, then Osborn's case holds that this, without more, gives "the right to sue in those courts" in *all* cases.

This view is strengthened by the consideration that the power to sue and be sued is incident to every corporation, without being expressly conferred, and that if the only object of Congress in the Pacific Railroad Act had been to confer the right to sue, it would have stopped there, and there would have been no reason for referring to the courts in which the power might be exercised.

The words expressly giving the corporation capacity "to sue and be sued in all courts within the United States" can only have effect by holding them to embrace the Circuit Courts of the United States; otherwise these Courts, though Courts of law and equity, were, prior to the Act of March 3, 1875, the *only* Courts in the United States in which this corporation, the child of the Government, could *not* sue and be sued. In short, these words used by Congress in ref-

erence to this corporation were intended to make suits by and against it justiciable in the Federal Courts.

Another strong consideration in favor of the view here urged is that it cannot be supposed that Congress intended to shut the doors of the Federal Courts against the Union Pacific road. There are but two grounds of Federal jurisdiction: the character of the suit and citizenship. If the language "all courts," &c., includes the Circuit Courts, it gives them jurisdiction by virtue of the subject matter and not on the ground of citizenship. The language of the charter does *not* limit the class of suits which may be brought by and against the Union Pacific Company to those in which some question arises which requires a construction of a treaty or the Constitution or laws of the United States. In this respect the Company's charter is precisely like the bank charter construed in *Osborn's case*. And the real and only contested or doubtful point in that case, so far as Federal jurisdiction is concerned, was, whether ordinary suits in *assumpsit* or *tort*, by or against the Bank, in which no question arose which required the construction of an Act of Congress or the Constitution, could be said to be "a case arising under the laws of the United States"; and the affirmative of the proposition was adjudged.

I do not see how either of the four Pacific roads can sue or be sued in the Federal Courts on the ground of citizenship. They are chartered by Congress to be built and operated in several States. They are situate and operated in two or more States. If the Pacific roads are citizens of *every* State, or are citizens of *no* State, the Federal Courts are closed to them on the ground of citizenship. And the effect of the construc-

tion of the language of the charter contended for by the other side is that Congress, in the charters of these companies, discriminated against creations of its own, excluding them from its own Courts on both grounds of jurisdiction, while allowing all other persons and corporations to go into those Courts on the ground of citizenship.

If, therefore, Congress intended to embrace these Courts, then this language should be construed as if it read that the Union Pacific Company "shall be able to sue and be sued in the *Circuit Court of the United States*"; and if it read it in this way, it would be precisely like *Osborn's case*, hereinbefore referred to, and would give jurisdiction of *any* suit falling within the general jurisdiction of the Court, irrespective of the question whether it specifically involved the construction of the Constitution or of some law of the United States. If such is the correct view, and the Circuit Court may take *original* cognizance, at the instance of the corporation or of a suitor, of just such a suit as the one at the bar, the jurisdiction by way of removal, probably under section 640, certainly under the Act of March 3, 1875, is as broad as the original jurisdiction. Why not? And I insist that any view of this case is fragmentary and inadequate that does not take into consideration the charter provision in connection with section 640, and the still broader Act of 1875, and which does not determine the question of Federal jurisdiction over the corporation upon consideration of all of these acts.

In Hughes vs. Northern Pacific Railroad Company, the language of whose charter is the same as that of the Union Pacific Company, in the United States

Circuit Court, Oregon, 18 Fed. Rep., 806, the plaintiff, a citizen of Oregon, brought suit in the United States Circuit Court for the District of Oregon, to enjoin the Northern Pacific Company from building a bridge over the Willamette River near Portland. The company insisted that it was authorized to build the bridge under its Congressional charter. The Court held that the Act of March 3, 1875 (18 Stats., 480), conferred jurisdiction, because this was a *suit arising under a law of the United States.* Of course this was clear. In further discussion of the question of jurisdiction, DEADY, J., says:

"Whether the Court also has jurisdiction of the suit on account of the citizenship of the parties, it is not now necessary to determine. The plaintiff is a citizen of Oregon, and it is assumed by the demurrer that the defendant is also. But the status of the defendant in this respect is not settled by any adjudication that I am aware of. It has been sued in this Court by a citizen of another State as a citizen of Oregon, and submitted without question to a trial of the case and a judgment against it accordingly.

"It is a corporation created by an Act of Congress, with ability 'to sue and be sued' in all courts 'within the United States,' and is authorized and empowered to construct and operate a railway in this and other States of this Union. The capacity 'to sue and be sued' does not of itself authorize the defendant to sue and be sued in any court, irrespective of the jurisdiction pertaining to the same; it only enables it to sue or be sued as a natural person might, in any court having otherwise jurisdiction of the controversy."

Man. N. B., &c., vs. Black, 8 Blatch., 138.

"But of what State, if any, the defendant is a citizen of is not so clear. In Orange N. B. vs. Traver, 7 Saw., 210, this Court was inclined to the opinion that a banking corporaton formed under the General Banking Act of June 3, 1864 (13 Stat., 99) to do business in Massachusetts was a citizen of that State. And such was the

conclusion reached by Mr. Justice BLATCHFORD in Man. N. B., &c. vs. Black, *supra*. See Main vs. Second N. B., &c., 6 Biss., 26. But the defendant is organized to exist and do business in more States than one, without any declaration or provision indicating a particular domicil or principal place of business in any."

"But in Osborn vs. United States Bank, 9 Wheat., 816, it was held by the Supreme Court that a corporation created by an Act of Congress, might be thereby authorized 'to sue and be sued' generally in the Circuit Courts of the United States, and the power of Congress to give such Court jurisdiction of such a suit was sustained on the ground that any suit by or against such a corporation was necessarily a case arising under the laws of the United States, and, therefore, within the scope of its judicial power."

"*And since the decision in that case, Congress, by the Act of 1875, supra, has conferred upon the Circuit Courts jurisdiction in all cases arising under the law of the United States.* **The effect of this legislation, under the ruling in Osborn vs. United States Bank, supra, is equivalent to a special clause in the charter of the Northern Pacific, authorizing it to sue and be sued in the Circuit Court in all cases.** But the jurisdiction of the Court on the ground of the nature of the controversy being clear, the question as to the authority of the defendant to construct the bridge is next to be determined."

The judgment of this very careful and able Judge is that the effect of the Act of March 3, 1875, in view of the decision in Osborn vs. The Bank, is "equivalent to a special clause in the charter of the Pacific roads, authorizing them to sue and be sued in the Circuit Court in all cases," and not alone in cases in which the issue to be tried is one necessarily and directly involving the construction or effect of some particular clause in the Congressional charter. In other words, in his judgment every case, since the passage of the Act of March 3, 1875, against one

of the Pacific roads, is a case arising under the law of the United States, over which, therefore, the Circuit Court would have original jurisdiction or jurisdiction by way of removal. I think the learned Judge was mistaken in conceding, as he seemed to do, that there was no original jurisdiction in the Circuit Courts by virtue of the charter of the company, and none until the Act of March 3, 1875.

2. *Federal Jurisdiction over Pacific Roads by way of removal.* The case of the Union Pacific Railroad Company vs. McComb, 17 Blatchford, 610, 1880, distinctly presented the sole question as to the federal jurisdiction, *via.*, removal over the Union Pacific Company under the Act of March 3, 1875. The company, as plaintiff sued McComb in the Supreme Court of New York *for an accounting of certain securities belonging to it, alleged to have been fraudulently received and converted by the defendant.* McComb removed the cause into the Circuit Court. The petition for removal stated that the plaintiff was a corporation created by an Act of Congress, and that the suit and the matters in dispute therein *arose under the laws of the United States.* The ground on which the motion to remand was based was that the matters in dispute in the suit "in nowise concern, or are involved in or are controlled by any laws of the United States, except in so far as the same may be concerned by the fact" that the plaintiff was incorporated by an Act of Congress.

BLATCHFORD, J., says: "The 2d section of the Act of March 3d, 1875 (18 Stats. at Large, 470), provides for

the removal of a suit 'arising under the Constitution or Laws of the United States,' by either party to such suit. This enactment is warranted by the provision of Section 2 of Article 3 of the Constitution of the United States, that the judicial power of the United States 'shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States,' &c. Under the principles laid down in the decision in *Osborn vs. The Bank of the United States* (9 Wheat. 738, 819), **it must be regarded as settled that a suit by a corporation created by the United States is a suit arising under the laws of the United States.**

"The allegations of the petition above recited are sufficient to show that the suit arises under a law of the United States. The case is not like that of Gold Washing Co. vs. Keyes (6 Otto, 199). [Relied on by the defendant in error in the case at bar.] In that case, the corporation was not one created by an Act of Congress, and the petition for removal, which was made by the corporation and others, did not state facts sufficient to show that the case, which was a suit against the corporation and others, arose under the laws of the United States. In the present suit, *the mere allegation that the plaintiff is a corporation created by an Act of Congress shows that the suit is one arising under the laws of the United States.*

"*The motion to remand the suit is denied.*"

So, in *Cruikshank vs. The National Bank*, Circuit Court, District of New York, 16 Federal Reporter, 888, 21 Blatchf., 322, WALLACE, Circuit Judge, in discussing Act of 1875, the as to causes arising under the Constitution and laws of the United States, says:

"It seems to have been intended to confer on the Circuit Court all the jurisdiction which, under the Constitution, it was in the power of Congress to bestow. What is meant by a case arising under the laws of the United States, as expressed in the Constitution, has not been doubtful since the case of *Osborn vs. The Bank*, 9 Wheat., 738. It was there decided that any suit in which a law of Congress was of necessity an ingredient in the case, was a case arising under a law of

the United States, notwithstanding the main controversy might depend altogether on questions unconnected with any such law." He adds: "It was decided by this Court, in Union Pac. R. Co. vs. McComb, 1 Fed. Rep., 799 (same case, 17 Blatchford, 510), that a suit by a corporation created by Act of Congress is a suit arising under the laws of the United States, within the meaning of section 2 of the Removal Act of 1875. A suit brought against such a corporation must fall within the same category. *Every act of such corporation derives its legal complexion and attributes* from the law which creates it, and endows it with the faculty of acquiring rights and committing wrongs. A suit cannot be maintained against it without invoking the law of Congress."

TURTON'S CASE IN POINT. The decision of Mr. Justice MILLER in Turton vs. Union Pacific Ry. Co., 3 Dillon, 366, 1875, is precisely in point, since that is a case identical in all respects with the case at bar so far as the right to removal rests upon section 640 of the Revised Statutes (Act July 27, 1868), which was the statute construed in that case. The following is the report in full:

"This was an action originally commenced in one of the State Courts of Nebraska, by the plaintiff, a citizen of that State, against the defendant, to *recover damages alleged to have been sustained by the plaintiff, caused by the negligence of the defendant in operating its road. Answer in denial was filed in the State Court.* Afterwards the defendant filed its petition in the State Court for the removal of this cause into this Court, stating *inter alia* therein, that it was a corporation created and organized by virtue of a law of the United States, approved July 1st, 1862, and that it is not a banking corporation, and that it has a defense to and in the said action arising under a law of the United States, to wit, under the act last mentioned. Surety was accepted, and the cause ordered to be removed by the State Court. In the Circuit Court the plaintiff

filed a plea to the jurisdiction of the Court, which the defendant denied. The *plea was submitted on an agreed statement of facts, which admitted no defense was claimed to exist, or was sought to be made under any other law of the United States than the charter of the defendant.*

12 Stats. at Large, 489.

Mr. Justice MILLER rendered judgment as follows:

"I am of opinion that the cause was properly removed into this Court under the Act of Congress relating to the removal of suits against federal corporations, and that it may be fully tried here upon its merits. Plea to jurisdiction overruled."

In Texas vs. Texas & Pacific R. R. Co. it was held that the Texas & Pacific Company, chartered by Congress March 3, 1871, had the right to remove, under section 640, an action brought by the State of Texas to recover of the defendant as forfeited certain land grants made to the defendant by the State.

Same principle:

Kain vs. Texas Pacific Railway Co., 3 Cent. Law. J., pp. 12, 13.

WE HAVE NOT THOUGHT IT ESSENTIAL TO DISCUSS MORE MINUTELY THE CONSTRUCTION OF SECTION 640, because if it has the restricted meaning put upon it in the brief of the learned counsel for the defendant in error, it only establishes that the right of removal given thereby is not as broad as that subsequently given by the Act of 1875, and the latter act is sufficient for our purpose in this case, irrespective of section 640, R. S.

Application of Foregoing Principles: Test and Demonstration of Federal Character of the Case at Bar.

The United States Bank under its charter could sue in the U. S. Circuit Court upon a bill or note, and if the only defense were payment or the State statute of limitations, the Federal jurisdiction, under the doctrine of Osborn's case, attached and remained.

Under the charter of the Union, Northern, Atlantic & Pacific, and Texas Pacific Companies, either of these companies can sue *originally* in the U. S. Circuit Court on a contract for freight or in assumpsit of any kind, and if the answer be merely in denial, or payment be pleaded, the jurisdiction is clear. Such a case is the same precisely as Osborn's case; and in both cases there is but one ground of jurisdiction, to wit, that they *are cases arising under the laws of the United States*, that is to say, under the Federal charter of the bank in the one case and under the federal charter of the railway company in the other; and this, although both could be tried without opening the statutes of Congress. So much is clearly and indisputably settled.

Now, suppose the United States Bank Charter were still in force, and the bank should sue or be sued in contract in a *State* Court. Could it not remove the case under the Act of March 3, 1875?

If a given suit, when *originally* brought in the U. S. Circuit Court, is one arising under the laws of the United States, is not the same suit one arising under those laws if originally brought in a *State* Court? Undeniably so; and, if so, it conclusively follows that it could be removed under the Act of 1875, or possibly under

section 640. If this would be the result in the supposed suit against the bank, it is equally the result in the actual suit against the present plaintiff in error.

Conclusion.

In short, after a careful study of *Osborn's* case, I have been able to reach no other conclusion than that the federal *jurisdiction in the case at bar cannot be denied without overruling that case and denying the soundness of the principles on which it rests.*

I have recently read once more the judgment of the great Chief Justice therein, with increased admiration of its breadth of view, of its perfection in manner, statement and logical force, and of its massive strength and completeness. Its doctrines were none too broad for the exigencies of the case then in judgment. In their entire scope, they are essential to the preservation of the constitutional supremacy of the Judicial Power of the Union. They have been accepted and followed without question in repeated adjudications for sixty years. I believe its doctrines were first denied application in the case at the bar. It may be said, however, that the reasoning and argument in *Osborn's* case on this subject are *dicta*. Not so. The propositions laid down were necessary to support the conclusion reached, as your Honors will perceive if you consider *de novo* the question there presented. The propositions of the opinion of the Chief Justice called *dicta* are each necessary links in a connected chain, which is broken if any one of them is rejected and removed. Of all the judicial judgments ever delivered, it is the most dangerous to disregard as *dicta* any part

of those pronounced by this master of judicial reasoning and great expounder of constitutional law.

Speaking of the British Constitution BURKE reverently declared:

"I dare not to rub off a particle of the venerable rust that rather adorns and preserves than destroys the precious metal. I would not violate with modern polish the ingenuous and noble materials. I put my foot in the tracks of our forefathers where I can neither wander nor stumble."

With like reverential regard should we look upon the constitutional judgments of MARSHALL. We may always be sure that we shall not go wrong if we only follow where he has marked out the way.

If Congress is of opinion that the federal jurisdiction ought not to extend to cases arising out of the ordinary operations of these federal railways in the States where they are situated, let it so enact. The remedy must come from the Legislature, and not the Courts, and the latter, it is submitted, ought to guard against the ever-present, unfelt, but none the less strong and often irresistible tendency to supply by "judicial legislation," what the Judges may feel to be defects in the laws as they stand, which a judicial judgment, in their power to render, would so easily amend, correct and improve. The mischief of their so doing is that *pro tanto* it converts the Court into an irregular and subordinate Legislature at the cost of its own dignity and function, and so paves the way for reciprocal legislative inroads.

The legal character of the Pacific Railroads is *sui generis*. The Government sustains towards these companies very important duplex relations—the relation of creditor and the relation of sovereign.

It is fitting that Congress alone should prescribe and apply any limitations upon the federal judicial jurisdiction over them, if it is of the opinion under the principles of *Osborn's case* and the many judgments that follow it, that the existing jurisdiction is too broad. The whole subject could then be dealt with by that body intelligently and the precise remedy, to the extent needed and no further, be devised and applied.

Upon the principles contended for by the other side there was no *original* federal jurisdiction over these corporations in any case until the Act of 1875, although such jurisdiction was constantly exercised by all the Circuit Courts of the Eighth and Ninth Circuits, in which those roads are situate, well as by Circuit Courts elsewhere. Until the Act of 1868 (now section 640) there was no federal jurisdiction by way of removal. That act assumed that there existed original jurisdiction over these companies in the Circuit Courts, and it met the only mischief that was then felt.

The Act of 1875 has the same effect under the principles of Osborn's case as if a clause had been inserted in the charter of the Pacific Companies authorizing them to sue and be sued in all cases in the Circuit Court; and the jurisdiction of these Courts by removal, under section 2, is as broad as their original jurisdiction.

Jurisdiction of the Circuit Courts by way of removal has always been commensurate with their original jurisdiction.

In the Judiciary Act, *and in all the subsequent legislation of Congress, on the subject of Federal juris-*

diction, the jurisdiction of the Circuit Courts by way of removal has always been, at least, co-extensive with their original jurisdiction.

It may be worth while to show this, since, if it be true, this Court will not readily conclude that in the Act of 1875, which was intended to *enlarge* the Federal jurisdiction, it was the purpose of Congress to depart from the principle which had underlaid all the previous legislation. Indeed, it is confidently submitted, that it will be impossible for the Court thus to hold, when it lays the first section of that Act, defining the direct original jurisdiction, side by side with the second section, defining the indirect jurisdiction by way of removal, and finds the language of the two sections to be identical in all respects.

UNDER THE JUDICIARY ACT, the right of removal of "suits of a civil nature" to the Circuit Courts of the United States, was co-extensive with the original jurisdiction of those Courts.

Section 11 of the Judiciary Act, which defined the *original* jurisdiction of the Circuit Courts, only extended it to suits where "an alien is a party," or where "the suit is between a citizen of the State where it is brought and a citizen of another State;" *subject matter* not having been made a ground of jurisdiction until the Act of March 3, 1875.

Section 12 of the Judiciary Act, which defined the jurisdiction of the Circuit Courts by way of *removal*, extended it to cases where the suit is against an alien, or is by a citizen of the State wherein it is brought, and against a citizen of another State.

THE PRINCIPLE, AS WELL AS THE STATUTE PROVISION was, that any suit might be removed by the defendant,

which might have been originally brought in the Circuit Court.

The Act of July 27, 1866, and the Act of March 2, 1867 (now Rev. Stat., Sec. 639, sub-divisions 2 and 3), departed from this principle and made the indirect original jurisdiction by way of removal broader than the direct original jurisdiction; in the Act of 1866, by allowing *part* of a case to be removed by the non-resident defendant; in the Act of 1867, by allowing either party to remove a cause where it is between citizens of different States, although the plaintiff was not a citizen of the State in which the suit was brought, as he must have been to give the Circuit Court direct original jurisdiction.

And thus the matter stood when the Act of March 3, 1875, was enacted. That Act was intended to fix the jurisdiction of the Circuit Courts. It is entitled "*An Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State Courts and for other purposes.*"

It enlarged the existing jurisdiction so far as it rested on *citizenship*, no longer requiring the plaintiff to be a citizen of the State where the suit was brought, and for the first time extended the jurisdiction to subject matter—*i. e.*, to "*all* suits of a civil nature, where the matter in dispute exceeds $500, arising under the Constitution or Laws of the United States" (Sec. 1).

In the section authorizing removals (Sec. 2), the exact language of the first section is used; the clear purpose being to make the *indirect* jurisdiction by way of removal commensurate with the *direct* original jurisdiction. It is clear that the jurisdiction by removal is not less; and under the second clause of the second

section it may possibly be greater than the direct original jurisdiction.

THIS REVIEW of the legislation of Congress and the result which it establishes, seems to me to control the question with which we are now dealing. For the Circuit Court probably has, and can have, direct original jurisdiction over any suit, in which the Pacific Railway is a party, only because it is a "case arising under a law of the United States."

Because this is such a case, the plaintiff might have brought it originally in the Circuit Court. If where it was thus brought it would have been "a case arising under a law of the United States," does it cease to be such a case, because he elects to bring it in the State Court, and the company elects to remove it to the Federal Court? The right of removal of the case at bar cannot, it is submitted, be denied without holding that, notwithstanding the identity of language of the first and second sections of the Act of 1875, the jurisdiction by removal is less extensive than the direct original jurisdiction, and without, also, practically denying to these companies, when sued in State Courts, all access to the Federal tribunals, since they cannot probably remove causes, in general, if ever, on the ground of citizenship as *State* corporations may do. Over 300,000,000 of dollars of the securities of these companies have been taken by investors on the faith of the Federal jurisdiction over these companies.

IF SECTIONS 1 AND 2 OF THE ACT OF 1875 ARE COMPARED, IT WILL BE SEEN THAT IT WAS THE UNMISTAKABLE PURPOSE OF CONGRESS TO MAKE THE JURISDICTION OF THE CIRCUIT COURTS BY REMOVAL EXACTLY COEXTENSIVE WITH THEIR ORIGINAL JURISDICTION.

EXCLUDED AS THIS COMPANY, IN COMMON WITH ALL THE PACIFIC COMPANIES, IS, OR MAY BE, FROM CITIZENSHIP AS A GROUND OF FEDERAL JURISDICTION, THERE IS NO REASON FOR LEANING AGAINST THE JURISDICTION ON THE GROUND OF SUBJECT-MATTER; AND THE JURISDICTION BY WAY OF REMOVAL CANNOT, IT IS SUBMITTED, BE MADE MORE RESTRICTED THAN THE ORIGINAL JURISDICTION CONSISTENTLY WITH THE LETTER, SPIRIT AND PURPOSE OF THE ACT OF 1875. IN SHORT, THE COMPANY ASKS NO MORE THAN THAT THIS COURT SHALL HOLD THAT UNDER THE CHARTER AND THE ACT OF 1875, THE JURISDICTION OF THE CIRCUIT COURTS OVER THE COMPANY BY WAY OF REMOVAL, IS PRECISELY COMMENSURATE WITH THEIR ORIGINAL JURISDICTION. AND WHY NOT?

JOHN F. DILLON,
Attorney for the Union Pacific Railway Company.

115-1

Supreme Court of the United States.

NO. 291.

THE UNION PACIFIC RAILWAY CO.

vs.

ABRAM MYERS.

BAR ASSOCIATION

ADVANCED UNDER RULE 32.

BRIEF FOR DEFENDANT IN ERROR.

W. HALLETT PHILLIPS,
THOS. P. FENLON,
For Defendant In Error.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS,
1884.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY CO.
vs.
ABRAM MYERS.
} No. 291.

ADVANCED UNDER RULE 32.

Brief for Defendant in Error.

This action was brought by Myers in the 10th District Court of Wyandotte County, Kansas, against the defendant company, for damages sustained from a personal injury.

The company, on the 4th of April, 1881, filed its answer denying that the injury was incurred through its negligence, and alleging that it was occasioned by the want of care of the plaintiff. It also pleaded a settlement, and a release from liability signed by the plaintiff. R., p. 4.

The answer concludes "that it is a railroad and not a banking corporation, and that it was organized under a law of the United States, and that it has a defense to this action arising under and by virtue of the laws of the United States."

On the same day defendant filed a petition for the removal of the cause to the United States Circuit Court, which was granted.

On motion of plaintiff the cause was remanded by Judge McCrary to the State Court, from which order defendant prosecuted the present writ of error.

The question is whether the case is a removable one.

The petition for removal states the organization of the Union Pacific Railroad Company, under the act of Congress, July 1, 1862, and the acts amendatory thereto.

It states the consolidation of that Company with the Kansas Pacific Railway Company (a Kansas Corporation), and the Denver Pacific Railway and Telegraph Company (a Colorado Corporation). That the consolidated Company had adopted the name of the United Pacific Railway Company, and was to all intents and purposes a corporation under the laws of the United States.

That petitioner had a defense to the action arising under and by virtue of the aforesaid laws of the United States. R., p. 6.

In remanding the cause Judge McCrary stated the following conclusions, concurred in by Mr. Justice MILLER:

> "1. It is not necessary to decide the question, so much discussed by counsel, as to the validity of the agreement of consolidation. I assume that it is valid, and upon that assumption hold—
>
> "2. That the present suit is not one 'arising under the Constitution and Laws of the United States,' within the meaning of the second section of the act of Congress, of March 3, 1875, providing for the removal of causes from a State to a Federal court.
>
> "3. That a suit by or against the Union Pacific Railway Company, a corporation formed in the manner disclosed in record, is not necessarily a suit arising under

the laws of the United States, so as to be removed, on that ground, from a State to a Federal Court.

"4 Even assuming that the defendant is a corporation, organized under the laws of the United States, I am still of the opinion that the motion to remand must prevail, because I hold that a suit cannot be removed from a State to a Federal Court upon the sole ground that it is a suit by or against such a corporation." R., p. 13, reported in 3 McCrary. 579.

For the purposes of argument, conceding that the defendant company is a corporation organized under a law of the United States, is the present suit, which is an action to recover damages for a personal injury caused by defendant's negligence, removable as "a case arising under a law of the United States," because brought against the defendant a corporation organized under such a law?

The removal is sought on account of the character of the question involved, and not on account of the character of the party.

The plaintiff in error must, therefore, establish that every suit against a Federal corporation, irrespective of the right asserted or the defense set up, is necessarily a case arising under a law of the United States and removable under the act of 1875.

To sustain this position, reliance is placed on *Osborn* vs. *Bank of the United States*, 9 Wheat., 740.

The general question there involved was whether Congress had power, under the Constitution, to confer jurisdiction on the Circuit Courts in suits against the Bank of the United States. The Bank was expressly authorized to sue in the Circuit Courts of the United States.

The suit was one to enjoin a State officer from interfering with the functions of the Bank. The particular question

discussed was whether it was in the power of Congress to give the Circuit Court jurisdiction of a case where a question to which the judicial power was extended by the Constitution formed an ingredient in the cause, although other questions were involved in it.

The Legislature of Ohio had passed a law for the purpose of expelling the bank from the State. "The law, if executed," say the court, "would unquestionably effect its object, and would deprive the bank of its chartered privileges, so far as they were to be exercised in that State."

The application to the court was to interpose its writ of injunction, to protect the bank from the total destruction of its franchise, and chartered privileges, so far as respected the State of Ohio."

The court held the clause constitutional. That the executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. This was the power which all governments should possess of expounding as well as enforcing, their own laws.

That a case was no less one arising under a law of the United States, because questions may arise in it which depend upon the general principles of the law, and not on any act of Congress.

The questions decided in the Osborn case do not touch the one we are now considering.

Congress has not said that the extent of the rights and obligations of the defendant company should be determined by the Federal tribunals.

That it has a right so to declare, was the point adjudicated in *Osborn* vs. *Bank of the United States.*

As remarked by the court below there is no law authorizing the defendant to remove an action brought against

it on any other terms than those provided for all other persons and corporations.

The inquiry is not what Congress might do, but what it has done.

In the act of July 1, 1862, incorporating the Union Pacific Railroad Company, is this clause: "It shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States." 12 St., 489.

This provision only enabled the corporation to sue in courts possessing the requisite jurisdiction.

The charter of the first bank of the United States enabled it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any place whatsoever."

This court held that these words gave only a general capacity to sue, and not a particular privilege to sue in the courts of the United States.

That they gave capacity to the corporation to appear in any court which would by law have cognizance of the cause if brought by individuals.

Bank of the U. S. vs. *Deveaux*, 5 Cr., 85.

In the charter of the bank of 1816, in addition to the words contained in the first charter, it was empowered to sue in *any Circuit Court of the United States.* It was the constitutionality of this additional power that was sustained in *Osborn* vs. *The Bank.*

In the charter of the Union Pacific Railroad Congress was careful not to confer any jurisdiction on the Federal Courts in suits by or against it. Nor has it made any provision for the removal of actions brought against such company, except as contained in the following statute.

By the act of 27th July, 1868, Revised Statutes, Sec. 640, it is provided:

> "Any suit commenced in any court other than a Circuit or District Court of the United States against any corporation other than a banking corporation, organized under a law of the United States, may be removed for trial in the circuit court, for the district where such suit is pending, upon the petition of *such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States.*"

The right of removal is given, by section 640 R. S., by reason of the character of the question involved. Not only must the petitioner be a corporation incorporated under a law of the United States but, in addition, it must have a defense arising under the constitution or laws. The right to remove is limited to suits in which the corporation is the defendant.

As shown by the debates the original bill which finally became the act of 27th July, 1868, was simply one to provide for the removal of suits against Federal corporations.

The clause requiring a petition, "stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States, was reported as an amendment to the bill by the Judiciary Committee of the Senate. In reporting the bill the chairman, Mr. Trumbull, stated the amendment was for the express purpose of limiting the right of Federal corporations to remove *to cases arising under the Constitution or laws.**

EXTRACTS FROM THE DEBATE IN THE SENATE.

*Mr. COLE. Mr. President, I desire to inquire of the Chairman for the Committee if this bill makes any further provision for the transfer of cases than that is authorized or appears on the face of the Constitution?

The jurisdiction of the United States Courts seems to be confined there. I do not know the purport of the amendment the committee have offered.

Judge Dillon, in his Treatise on Removals, speaking of this act, says:

> "If, in every suit against a Federal corporation, such corporation necessarily has a defense under a law of the United States, because it is a corporation organized under a law of the United States, why did not Congress unconditionally provide for the transfer of all suits

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Mr. TRUMBULL. Certainly not. We do not suppose that Congress has any authority to confer any other jurisdiction than such as is warranted by the Constitution; but the understanding of the Committee was that corporations created by act of Congress had a right to be heard in the United States Courts in cases arising under the laws of the United States, where it is shown that a defense arises under the laws of the United Sta'es.

Mr. COLE. Does this preclude parties from litigating with such companies in any of the States or Territorial courts?

Mr. TRUMBULL. Not at all. It merely provides for a transfer on the fact being alleged, verified by the oath of the party, showing the fact on the part of a corporation created by the laws of the United States; that it has a defense arising under or by virtue of the Constitution of the United States, or some treaty or law of the United States.

Mr. HOWARD. I wish to put a question to the Honorable Chairman of the Committee. Does this bill, which I have not had time to read, *apply to the branches of the Union Pacific Railroad as well as to the main corporation known as the Union Pacific Railroad? These are the Kansas* branch, the Sioux City branch, and various other branches, and branches in California Does it apply to all those branches?

Mr. TRUMBULL. That would be a matter of construction dependent upon a matter of fact as to whether they are incorporated by the United States. The bill is general in its terms, and applies to any corporation organized under a law of the United States. I do not understand that these branches are organized under a law of the United States, but if they are they would come within the purview of the bill.

Mr. HOWARD. They do not exist by virtue of charters granted by the United States, but their charters are either Territorial or State charters, and they receive subsidies in land or money from the United States, and there is a vast body of legislation applicable to them. Now, I submit to the Honorable Senator whether it is best to apply this statute to the branches as well as to the main trunk. I would not leave that doubtful, it seems to me.

without requiring that it should have a defense under or by virtue of a law of the United States?"
Dillon Removals, § 8, note.

We repeat, under this act a suit against one of the corporations described is not removable by reason alone that it is such a corporation, but only when it has a defense arising under the constitution or laws. Every suit against it cannot

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Mr. TRUMBULL:

"Of the constitutionality of a law that authorized a transfer of a cause from a State to a United States court, where a right is claimed under the Constitution of the United States, or some treaty or law of Congress, there can, I think, be no doubt. But the jurisdiction is not exclusive; *the State courts may still entertain jurisdiction of cases by and against corporations organized under a law of the United States, notwithstanding the passage of this bill;* but a corporation thus organized, would have the right, on showing by affidavit that it had a defense, based upon a law or treaty of the United States or the Constitution, to remove the cause into the United States courts." It has no reference in terms to the Pacific Railroad or any other railroad, but I suppose it had its origin, perhaps, in suits that are being instituted against the Pacific Railroad Company in the city of New York or elsewhere, by way of injunction, restraining their operations. This has become a great evil in the country. The directors of our great lines of railroad, like the Erie road, like the road stretching from Chicago by way of Rock Island to Omaha, and other large roads, are being frequently enjoined, by some inferior judge in the city of New York against going on with these great works; and though this bill does not reach to the case of corporations created by the States, we did suppose that it was competent for the United States to protect its own corporations, organized under its authority from injunctions granted by some recorder or inferior judge in the city of New York, by authorizing the Company to take such causes into the United States courts for adjudication. This is the extent of this bill, and it goes so far and no farther, to protect corporations organized by authority of Congress, by allowing them to appeal to the courts organized under authority of Congress for redress.

Mr. HENDRICKS. "Suppose *a citizen sues for material taken off his land, wood taken, stock killed, or any of those little cases* that arise in the neighborhood where he ought to have his remedy, the railroad company, for the purpose of vexing him, may take a transfer to the United States. Is not that a substantial denial of justice to the party?

he held to afford such a defense without treating the requirement, that it should file a statement that it had a defense arising under the laws or Constitution, as superfluous.

If every suit against such a company involved a defense arising under a law of the United States, all that the Court would have to ascertain in order to remove would be that the petitioner was chartered by Congress.

"So far as the constitutional question suggested by the chairman is concerned, I do not doubt that the right of transfer may be given where the question involves a right that is conferred by a law of the United States, but how far is that to be construed as extending? If the courts will stand by the letter of the provision, there is not so much danger to be apprehended; but if the courts should go so far as is suggested by the Senator from Illinois, if they *go so far as to say that this law is intended to protect corporations created by the laws of the United States in all of their litigation—in other words, that simply because a corporation has been created by the United States, therefore the cause may go to the courts of the United States, it will be a very dangerous construction.*"

Mr. TRUMBULL. "*That is not the bill, as the Senator will see, if he will look at it.*"

Mr. HENDRICKS. "I understood *the argument of the Senator to be that Congress has the right to provide so as to protect its own corporations.*"

Mr. TRUMBULL. "I *think so, so far as its laws go. Of course it would not protect them in regard to matters not arising under its own laws. But the bill was amended in the Judiciary Committee.* I am not sure whether the Senator from Indiana was present or not, *for the very purpose of carrying out his suggestions. If he will look at the amended bill he will see that it requires a petition, verified by oath, stating that the case does arise under some law of Congress.*"

Mr. HENDRICKS. "I have no question that the letter of this law being adhered to by the courts, the danger is not so great as I apprehended, when you take that in connection with the former provision, that it must be a corporation created by a law of the United States. I think any one may safely have the right to transfer a cause to the United States courts when his right depends upon a law of the United States." (Cong. Globe, pt. 5, 2d Sess. 40th Cong., p. 4198.)

The bill passed the Senate and in the House was incorporated as the second section of the bill to allow the United States to prosecute writs of error without giving security. (Id., p. 4431.) Act 27, July, 1868, 15 St. 227, R. S., Sec. 640.

Why then require that the petitioning corporation should file a statement under oath of what the Court was judicially bound to know?

It seems plain that, to entitle a corporation to remove under the act of 1868, not only must it be created by the United States, but, *in addition*, it must show a defense arising under the Constitution or laws of the United States.

We come, then, to the act of March 3, 1875 (18 Stat., 470).

Section one gives jurisdiction to the United States Circuit Courts, concurrent with the State Courts, of suits *arising under the Constitution or laws of the United States.*

Section two provides for the removal of such suits from the State Courts to the United States Courts.

It is contended that since the act of 1875 every suit against the defendant corporation is necessarily a suit arising under a law of the United States.

If our interpretation of the act of 1868 is correct, its requirements, in respect to the point we are considering, are the same as those of the act of 1875.

Under both acts the party must make a case under the Constitution or laws.

The words "case" or "defense" arising under the Constitution or laws of the United States are synonymous for the purpose of removal.

This is Judge Dillon's opinion.

> Dillon Removals, § 7;
> *R. R. Co.* vs. *Miss.*, 102 U. S.

Yet, if a removal is permitted under the act of 1875 merely because the defendant is a Federal corporation, a much broader scope must be given to it than to the act of

1868; for under that act it is not sufficient that the corporation is chartered by Congress. In addition, it must show a defense arising under a law of the United States.

By the act of 1875, as interpreted by defendant, they need not show such a defense; it is sufficient that it is chartered by Congress.

The act of 1868 is a legislative declaration of what Congress considered as constituting a case arising under the Constitution and laws.

If, in the view of Congress, every action against one of its corporation was such a case, it would never have required in addition that such corporation should show a defense arising under the Constitution or laws.

The wording of the act of 1875 is that of the Constitution conferring the judicial power.

The reason for this grant of jurisdiction was the necessity of preserving uniformity in the interpretation of the national laws.

Accordingly this court, as early as *Cohens* vs. *Virginia*, defined a case to arise under the Constitution or a law of the United States, whenever its correct decision depended upon *the construction of either*.

That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted.

Cohens vs. *Virginia*, 6 Wh., 264

These propositions, say the court in *Railroad Company* vs. *Mississippi*, are now too firmly established to admit or require further discussion.

Railroad Company vs. *Mississippi*, 102 U. S., 141.

> "There must be some question actually involved in the case depending for its determination upon the correct *construction* of the Constitution, or some law of Congress, or some treaty of the United States, in order to sustain the Federal jurisdiction under the clause under consideration, namely, 'suits arising under the Constitution, or laws or treaties of the United States.' The suit must, in part at least, *arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.*"
>
> *Gold Washing Co.* vs. *Keyes*, 96 U. S., 203.
> Dillon, Removals, 33.

It has accordingly always been held that, although the title, right or claim of the party may have grown out of a Federal law, it is not a case arising under that law, unless some question is raised as to the validity or construction of the law or the rights of the party under such law.

Thus a case arising under the patent law, although founded on letters patent, does not arise where there is no dispute as to the validity of the letters patent, but the controversy is as to the rights of the parties growing out of a contract for the use of the invention.

> *Hartell* vs. *Tilghman*, 99 U. S., 549.

The court cite *Nelson* vs. *Sandford*, 10 How., 99, where Chief Justice TANEY says:

> "The peculiar privilege given to this class of cases (patent causes) was intended to secure uniformity of decision in the construction of the act of Congress. Now the dispute in this case does not arise under any act of Congress, nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill, and there is no act of Congress regulating contracts of this kind. *The rights of the parties depend altogether upon common law and equity principles.*"

So a case arising under the land laws does not arise, although the title is derived from an act of Congress, when both parties admit that title and their litigation extends only to the rights which they have severally acquired under it.

Hoadley vs. *San Francisco*, 94 U. S., 4.
McStea vs. *Friedman*, 92 U S., 723.

In *Hartell* vs. *Tilghman*, *Supra*, the court say:

> "If a man owning a tract of land, his title to which is a patent from the United States, should sell or lease that land, and a controversy should arise between him and his vendee as to their rights in the premises, it could not be said that any suit brought by the vendor to assert his rights was a suit arising under the land laws of the United States; *and this would be beyond question*, if the defendant admitting the title of plaintiff to the land should make no other defense than such as was founded in rights derived from plaintiff by contract."

So "a case arising under the revenue laws" does not arise from the fact that one of the parties claimed through such laws, unless his title in that respect was disputed.

Ex parte Smith, 94 U. S., 456.

If every suit against the defendant corporation is a case arising under a law of the United States, it follows that all corporations organized by the United States can remove all of their litigation into the Federal Courts. All corporations chartered by Congress in the District of Columbia would have the right of removal.

This court exercises its appellate jurisdiction in cases coming from the State Courts, where there is drawn in question the validity of a statute of, or an authority exercised

under the United States, and the decision is against its validity, or where any title, right, privilege, or authority, is exercised under the United States, and the decision is against the title, right or immunity.

The jurisdiction thus given has always been considered as embodying the grant of the judicial power of cases arising under the laws of the United States.

Whenever a party shows a case arising under the Constitution or laws entitling him to remove a cause, he establishes a case which, if decided against in a State Court, would entitle him to bring it here by writ of error.

It could hardly be contended that the present case, if it had been tried in the State Court, could have been brought here on adverse judgment by writ of error.

This court has held that national corporations are amenable to State control and subject to the operation of State legislation, "except so far as that legislation may interfere with, or upon their efficiency in, performing the functions by which they were designed to serve that government."

National Bank vs. *Comth*, 9 Wall., 362.

> "The exemption of Federal agencies from State taxation is *dependent not upon the nature of the agents or upon the mode of their constitution or upon the fact that they are agents*, but upon the effect of the tax; that is upon the question whether the tax does, in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."

Railroad Co. vs. *Peniston*, 18 Wall., 33.

In the latter case *Osborn* vs. *Bank of the United States* was much relied on by the Union Pacific company as holding it

exempt from State taxation; but the court held that the property of the company was taxable in common with all other property in the State of a similar character.

If State jurisdiction for the purposes of taxation of property of the company is not prohibited *merely because it is the property of an agent* of the government, it is difficult to see why State jurisdiction, exercised through its judiciary, should be taken away merely because the company is a party to the litigation.

No more in the one than in the other case can the Federal protection be invoked by reason of the character of the agent, or upon the mere fact that the Company is such agent.

The dissenting judges in the Peniston case, did not hold that exemption from State jurisdiction resulted from the fact alone that the company derived its powers from Congress. Their proposition was as follows:

> "The Union Pacific Railroad Company being a United States corporation, created for national objects and purposes, and deriving its existence, its powers, its duties, its liabilities from the United States alone; being responsible to the United States for a whole congeries of duties and observances; being subjected to the forfeiture of its corporate franchises, powers and property to the United States, and not to any individual State; being charged with important duties connected with the very functions of the government; every consideration adduced in the cases of *McCulloch* vs. *Maryland* and *Bank of the United States* vs. *Osborne*, would seem to require that it should be exempt, not only from State taxation but from State control and interference, except so far as relates to the preservation of the peace, *and the performance of its obligations and contracts. In reference to these* and *to the ordinary police regulations, of course it is amenable to State and local laws.*"
>
> 18 Wall., 47.

In the present case, as in that of Peniston, the exemption from State jurisdiction is sought to be established from im-

plication, arising out of the nature of the corporation. Congress has not deemed it necessary to confer the power of removal upon the corporation, except to the limited extent provided by sec. 640, R. S.

In *Ames* vs. *Kansas*, 110 U. S., the whole question was whether the directors of the Union Pacific Railroad and the Kansas Pacific Railroad could remove the suits brought against them by the State to test the validity of the articles of consolidation. This court held that the case was plainly one arising under the laws of the United States. The validity of the consolidation rested alone on the authority conferred by the acts of Congress. If they conferred the authority the consolidation was valid; it not, invalid. The right set up by the company would be defeated by one construction of these acts and sustained by the opposite construction. A case was presented which arose under the laws of the United States.

We submit that the record on the present writ of error does not present a *casus federis*. The action the ordinary one for damages for a personal injury, was brought against a corporation existing in the State of Kansas.

The defense was want of negligence.

The court was not called upon to give construction to any law of Congress or to any right of the defendant growing out of those laws.

It is true the defendant alleges in general terms that it has a defense arising under the laws of the United States. But what that defense consists of, it fails to show.

Such a general declaration is not sufficient.

Gold Washing Co. vs. *Keyes*, 96 U. S., 640.

Because the defendant derived its franchises from the laws of Congress, that no more makes the present action against it a suit arising under those laws, than an action concerning a patent against a person whose rights are derived

from the patent laws, necessarily constitutes a case arising under those laws.

The controversy in no wise concerns the chartered rights of the defendant, but merely relates to its liability under State law, for the injury.

We have not discussed in this brief the status of the Union Pacific Railway Company, a corporation formed in the manner disclosed by the record

That question will be considered in our brief in the case of *Union Pacific Railway* vs. *City of Kansas.*

Assuming that the defendant is a corporation organized under the laws of the United States, we submit that the conclusion the court below reached was correct, and that a suit cannot be removed from a State to a Federal court upon the sole ground that it is a suit by or against such a corporation.

The judgment should be affirmed.

W. HALLETT PHILLIPS,
THOS. P. FENLON,
For Defendant in Error.